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IN THE

# Supreme Court of the United States

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MAN-SEOK CHOE,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the detention without bail of an extradition defendant who has been found to pose no danger to the community and no flight risk violates the Due Process Clause.

2. Whether courts have misinterpreted *Wright v. Henkel*, 190 U.S. 40 (1903), to require that all extradition defendants be detained without bail, even if they have been found to pose no danger to the community and no flight risk, unless they can demonstrate the existence of additional "special circumstances."

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## PETITION FOR A WRIT OF CERTIORARI

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Petitioner Man-Seok Choe respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The orders of the Court of Appeals denying Petitioner's emergency motion for bail pending extradition proceedings (Pet. App. 44a) and denying reconsideration (Pet. App. 45a) are unreported. The Magistrate Judge's order denying Petitioner's request for bail pending extradition proceedings (Pet. App. 38a-42a) and civil minutes showing the District Court's denial of review/reconsideration of that order (Pet. App. 43a) are also unreported.

## JURISDICTION

The Court of Appeals' order denying Petitioner's emergency motion for bail pending extradition proceedings was entered June 13, 2006. The Court of Appeals' order denying Petitioner's motion for reconsideration or rehearing was entered August 7, 2006. Justice Kennedy extended the time to file this petition to and including November 20, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the Constitution provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." The full text of the Fifth Amendment, as well as the statute that authorizes extradition, 18 U.S.C. §3184, are set forth in the petition appendix (Pet. App. 46a-47a).

## STATEMENT

Federal courts have repeatedly misconstrued a 1903 decision of this Court, *Wright v. Henkel*, 190 U.S. 40 (1903), as requiring defendants facing extradition to show "special circumstances" in order to obtain bail, even when a defendant poses *no* danger to society or risk of flight (and would, therefore, be entitled to bail in a non-extradition case). The imposition of this unique requirement upon extradition defendants violates the Due Process Clause and this Court's decisions interpreting that Clause, which preclude the State from depriving individuals not convicted of a crime of their physical liberty except under carefully circumscribed conditions that involve either a risk of flight or a danger to society. *See United States v. Salerno*, 481 U.S. 739, 749, 751-52 (1987); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). It also contrasts sharply with the rule in non-extradition cases,

upheld in *Salerno*, which permits pretrial detention only when the government has proved by clear and convincing evidence that no conditions of release will reasonably assure the defendant's appearance and the safety of the community. 18 U.S.C. §3142(e).

Because the federal courts have uniformly misinterpreted *Wright v. Henkel* to require this result, the unconstitutional detention of extradition defendants who pose no risk of flight will continue unabated in the hundreds of extradition proceedings that take place each year, unless this Court steps in to correct the lower courts' constitutional error.

1. Petitioner Man-Seok Choe is 65 years old and has lawfully resided in the United States for 35 years. Pet. App. 40a. He and his wife of over 30 years have lived at the same house in California since 1999. Petitioner's wife is a naturalized United States citizen, and their son Wilson Choe is a United States citizen by birth. Petitioner, a Korean citizen, applied for United States citizenship in 1999. He was interviewed in 2001 and is awaiting action on his application, as he continues to maintain lawful status as a resident alien. Ex. C at 22-24.[1]

Petitioner has significant ties to the community and owns and operates Cal-Ransom, Inc., a real estate development and property management company. Ex. B at 3. In his individual capacity and through Cal-Ransom he owns or has a majority interest in six commercial properties. He has no criminal record. *Id.*

2. On February 15, 2006, U.S. Marshals appeared unannounced at Petitioner's residence and took him into custody. Clerk's Record ("CR") 3.[2] The warrant authorizing Peti-

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[1] Cited exhibits are those submitted to the Ninth Circuit in connection with Petitioner's emergency motion for bail.

[2] Citations to the Clerk's Record are to the record of the District Court.

tioner's arrest was based on a complaint filed by the United States Attorney on behalf of the Republic of Korea pursuant to 18 U.S.C. §3184 seeking an order certifying that Petitioner was subject to extradition on three charges: (1) lobbying on behalf of a private company seeking a government contract; (2) payment of a bribe to close an investigation; and (3) leaving the country without proper departure documents. CR 1; Ex. A.

The charges that are the subject of the extradition request all relate to or arise out of Petitioner's lobbying efforts on behalf of a French-owned company, Alsthom Company, in its successful bid to secure from the Korean government the contract for high speed rail cars. Alsthom contracted with Petitioner to act on its behalf in its efforts to secure the rail car contract and agreed to pay Petitioner a commission if its efforts were successful. Ex. A at 3. After the Korean government awarded Alsthom the contract, Alsthom paid Petitioner his commission. Ex. G at 55, 58, 71, 76; Ex. A at 3. Petitioner transferred a portion of his commission to Ki Choon Ho, who had referred Alsthom to him and with whom he had arranged to split the commission. Ex. G at 62, 76.

The transfer of funds from Petitioner's bank account to Ms. Ho's bank account, both in Hong Kong, spurred an investigation. After Korean police questioned Ms. Ho about the transfers, she allegedly made payments to a Korean police officer to have the investigation closed. Ex. G at 78, 82-83; Ex. A at 4. She later claimed that she made this payment with Petitioner's knowledge and support, and had been reimbursed by him for half of the payments. Ex. G at 82.

In April 1998, the Korean Supreme Prosecutor's Office initiated an investigation into Petitioner's receipt of funds from Alsthom. Ex. G at 72; Ex. A at 4. On September 28, 1999, Korean prosecutors obtained a departure prohibition preventing Petitioner from leaving the county without authorization for 30 days. Ex. G at 78, 84, 98. On October 2,

1999, Petitioner, who was unaware of the departure prohibition, was stopped at the Seoul airport as he was attempting to return home to Los Angeles and his passport was seized. Ex. G at 85. On October 29, 1999, Petitioner appeared at the Central Investigation Department at the Supreme Prosecutor's Office and made a statement. Ex. G at 79. Sometime thereafter, and after the departure prohibition had expired, Petitioner departed Korea and returned home to Los Angeles. Ex. G at 85.

3. The day after Petitioner's arrest under the extradition warrant, February 16, 2006, Magistrate Judge Parada ordered him detained without bail on the ground that "[i]n extradition cases . . . only 'special circumstances' will justify bail" and no such circumstances had been shown. Pet. App. 1a.

On April 4, 2006, Petitioner filed an application for review and reconsideration of the order detaining him without bail. CR 15. Petitioner argued both that special circumstances were present justifying his release and that the requirement of special circumstances when an extradition defendant presents no danger to the community or risk of flight violates due process. His wife and son offered to sign an affidavit of surety for over $1 million dollars fully secured by real property, and Petitioner agreed to submit to electronic monitoring, travel restrictions, and any other court-imposed condition. Pet. App.40a.

On April 6, 2006, Magistrate Judge Goldman held a hearing on Petitioner's bail application. At that hearing, the Magistrate Judge found no flight risk:

> In an ordinary bail situation, there's no doubt in my mind that there are conditions or combination of conditions that will ensure this defendant's appearance in court, okay? There's sufficient sureties, there's ties to community, there's no prior criminal record. All of the factors articulated in Section 3142 weigh in favor of this defendant. It's an economic crime. It doesn't pose

> a danger to the community. . . . There's not even charges—have been filed, which is even more interesting. What I'm dealing with here is the statutory and the case law requirement of special circumstances.

Pet. App. 7a.[3]

Despite the Magistrate Judge's confidence that conditions could be established to ensure Petitioner's appearance at future proceedings, on April 10, 2006, Magistrate Judge Goldman denied the application for bail. Pet. App. 41a-42a. In his written order, Magistrate Judge Goldman found "that Choe poses no real danger to the community and that conditions of bond could [be] set which would insure Choe's appearance in court when required." Pet. App. 40a. However, he concluded that this Court's decision in *Wright v. Henkel* and corresponding Ninth Circuit precedent required a showing of "special circumstances" warranting release before he could grant bail, even where no flight risk is present. Pet. App. 39a-40a. Consequently, he "reluctantly" denied bail. Pet. App. 40a-41a. The Magistrate Judge also rejected Petitioner's argument that detaining an extradition defendant who poses no risk of flight or danger to the community violated due process. Pet. App. 39a, n.2.

After Petitioner's application for review and reconsideration of the Magistrate Judge's order was denied, CR 21, 22; Ex. C at 20, he filed an application with the District Court seeking review of the order, which he also styled as a habeas petition under 28 U.S.C. §2241. Ex. C; CR 23, 25. Petitioner argued both that he had established special circumstances justifying a grant of bail and that, because he was not a flight risk, his continued detention without bail violated due process. On May 19, 2006 the District Court filed a one-

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[3] 18 U.S.C §3142, to which the Magistrate Judge referred, governs release of a defendant pending trial in the United States, and does not apply to extradition proceedings.

sentence minute order stating that "bail is denied." Pet. App. 43a. The District Court did not disturb the Magistrate Judge's finding that detention was not required to ensure Petitioner's appearance.

Petitioner filed a notice of appeal on May 22, 2006 and an emergency motion for bail in the Ninth Circuit, in which he argued that the detention without bail of an extradition defendant who is not a flight risk violates due process. On June 13, 2006 the Ninth Circuit issued a one-sentence order denying Petitioner's motion, citing *Wright v. Henkel*, 190 U.S. 40 (1903), and *Salerno v. United States*, 878 F.2d 317 (9th Cir. 1989). Pet. App. 44a.[4] Petitioner filed a motion for reconsideration/rehearing, in which he renewed his due process argument and asked the court to address it. On August 7, 2006, the Ninth Circuit denied that motion. Pet. App. 45a. This petition for certiorari seeks review of these Ninth Circuit orders.

On October 10, 2006, the Magistrate Judge granted Korea's request for Petitioner's extradition and ordered his continued detention. The District Court rejected Petitioner's habeas petition challenging the extradition order on November 7, 2006, and Petitioner filed a notice of appeal two days later. The appeal of the extradition order remains pending, and Petitioner remains in detention in the United States. He has now been in custody for over nine months.

4. The Magistrate Judge had jurisdiction over Petitioner's application for bail under 18 U.S.C. §3184 and federal common law. *Wright v. Henkel*, 190 U.S. at 62-63. The District Court's jurisdiction was additionally based on 28 U.S.C. § 2241.

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[4] It is not clear from the order whether the Ninth Circuit simply ignored Petitioner's due process argument or erroneously believed that *Wright v. Henkel* foreclosed it.

## REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision in this case presents a square conflict with Supreme Court precedent and involves a matter of great national concern: whether the Constitution permits a person whose extradition is sought by a foreign state to be detained without bail even if he or she poses no danger to society and no risk of flight. The circuit and district courts have uniformly misinterpreted this Court's 1903 decision in *Wright v. Henkel* to require detention of all extradition defendants, even those who present no danger or flight risk, unless they can demonstrate the existence of "special circumstances." Given the circuit courts' blind allegiance to this accepted, albeit incorrect, understanding of *Wright v. Henkel*, the constitutional protections of the Due Process Clause will continue to be violated unless this Court steps in and grants certiorari.

1. In *Wright v. Henkel*, 190 U.S. 40 (1903), this Court reviewed a lower court ruling that denied release on bail on the ground that no statute granted courts authority to release extradition defendants on bail. The Supreme Court noted that releasing extradition defendants on bail could threaten the government's interest in delivering accused individuals to requesting governments. *Id.* at 62. Nonetheless, and despite the absence of any statutory authority, the Court held that courts could grant bail in extradition cases:

> We are unwilling to hold that the circuit courts possess no power in respect of admitting to bail other than as specifically vested by statute, or that, while bail should not ordinarily be granted in cases of foreign extradition, those courts may not in any case, and whatever the special circumstances, extend that relief.

*Id.* at 63. The Court went on to explain, "Nor are we called upon to do so as we are clearly of [the] opinion, on this record, that no error was committed in refusing to admit to bail," so it did not reverse the lower court's order. *Id.* The

Court gave no more specific explanation as to why the record did not support bail.

In *Wright v. Henkel*, this Court gave no indication that by using the phrase "special circumstances" it meant anything other than the particular circumstances or totality of the circumstances present in any given extradition case. Nor did it address the question whether a showing that a defendant posed no risk of flight or danger to society would suffice to establish entitlement to release on bail, or whether a contrary holding would violate the Due Process Clause.[5]

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[5] Even if this Court in 1903 *had* meant to require a showing of additional "special circumstances" before relief could be granted, there would be adequate reason to question the continued force of such a rule given the dramatic changes in circumstances since *Wright* was issued. At that time, international travel was expensive, time consuming and dangerous; international crimes were unusual; and extradition cases were extremely rare. Now, by contrast, international travel is relatively common, modern telecommunications and the internet make international crime possible without ever traveling abroad, and the rise of international business and expansion of foreign criminal laws have made extraditable offenses far more common. *See* Ann Powers, *Justice Denied? The Adjudication of Extradition Applications*, TEX. INT'L L.J. 277, 321-22 (2002). Thus, the class of defendants in extradition proceedings presently includes persons with strong ties to the United States, who may be accused of relatively non-serious offenses for which bail would routinely be granted in a purely domestic proceeding. Extradition requests increased from fewer than twenty per year before 1970 to 338 in 1982. *Reform of the Extradition Laws of the United States: Hearings on H.R. 2643 Before the Subcommittee on Crime of the House Committee on the Judiciary*, 98th Cong., 1st Session 34 (1983) (statement of Roger Olsen, Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice). While more recent statistics are not available, the numbers have likely continued to rise. *See* page 16 *infra*.

Moreover, there are heightened reasons for concern about the due process implications of a rule precluding release. Extradited defendants are now commonly subjected to "provisional arrest" procedures pursuant to which they are detained for forty to sixty days based solely on the representations of the requesting country, even before that country has

2. Despite the silence of *Wright v. Henkel* on these key issues, lower courts have uniformly but incorrectly interpreted the decision to require a showing of "special circumstances" before an extradition defendant may be released on bail. *See, e.g., In re Kirby*, 106 F.3d 855, 858 (9th Cir. 1997) ("Over ninety years ago, the Supreme Court recognized that there is a presumption against bail in an extradition case and only 'special circumstances' will justify bail."); *United States v. Kin-Hong*, 83 F.3d 523, 524 (1st Cir. 1996) ("[O]nly 'special circumstances' justify release on bail" in an extradition case); *Martin v. Warden*, 993 F.2d 824, 827 (11th Cir. 1993) ("[A] defendant in an extradition case will be released on bail only if he can prove 'special circumstances'"); *In re Russell*, 805 F.2d 1215, 1216 (5th Cir. 1986) ("Bail should be denied in extradition proceedings absent 'special circumstances.'"); *United States v. Leitner*, 784 F.2d 159, 160 (2d Cir. 1986) ("[B]ail can be granted only in 'special circumstances'").

Thus, even where there is a low risk of flight or danger or the absence of any such risk, courts have construed the Supreme Court precedent to mandate denial of bail unless the defendant can show some additional "special circumstance." *See, e.g., Kin-Hong*, 83 F.3d at 524-25 (reversing grant of bail based on absence of special circumstances, despite district court finding that conditions of release would adequately

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made a formal extradition request. M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 675-77, 682 (1996). And while at the time of *Wright v. Henkel* most extradition treaties excluded United States citizens, many treaties now authorize such extraditions. Siegfried Wiessner, *Blessed Be the Ties that Bind: the Nexus Between Nationality and Territory*, 56 MISS. L.J. 447, 527 n.367, 528 (1986) (citing treaties).

These changes in extradition law and practice, in combination with this Court's expansion of due process protections against unlawful detention since the turn of the century, would provide cause for reconsideration of *Wright v. Henkel* even if, as most lower courts have read it, it did foreclose the circuit court from considering Petitioner's due process claim.

ensure defendant's presence at future proceedings); *Martin*, 993 F.2d at 827 n.4 (Supreme Court and circuit precedent preclude basing release decision on defendant's flight risk); *Salerno v. United States*, 878 F.2d 317, 318 (9th Cir. 1989) (absence of flight risk not criteria for release in extradition case); *Leitner*, 784 F.2d at 160-61 (reversing grant of bail based on absence of special circumstances when magistrate judge found "almost no risk of flight"); *United States v. Williams*, 611 F.2d 914, 915 (1st Cir. 1979) (per curiam) (defendant's "acceptability as a tolerable bail risk" does not justify release on bail).[6]

Furthermore, because these courts have deemed this prohibition on release to be mandated by Supreme Court prece-

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[6] Other than the uniformly stated rule that the absence of a risk of flight or danger to society does not present a special circumstance, the question of which circumstances would qualify as "special" is wholly unclear. Often cited is Judge Hand's interpretation of *Wright v. Henkel* as precluding bail except "in the most pressing circumstances, and when the requirements of justice are absolutely peremptory." *In re Mitchell*, 171 F. 289, 289 (1909). Examples of circumstances that lower courts have deemed sufficiently pressing include the defendant's youth and resultant absence of a suitable facility to hold him, *Yau-Leung v. Soscia*, 649 F.2d 914, 920 (2d Cir. 1981); likelihood of success at the extradition hearing, *In re Gonzalez*, 52 F.Supp.2d 725, 741 (W.D. La. 1999); the anticipated length of proceedings, lack of danger to the community, health problems caused by incarceration, inability to practice religion in jail, and absence of a diplomatic necessity for denying bail, *United States v. Taitz*, 130 F.R.D. 442, 446 (S.D. Cal. 1990); unusual delay, the release of similarly situated defendants, substantial merits questions and unique political implications, *In re Kirby*, 106 F.3d at 863-65; unusual delay, the availability of bail in the requesting country, and the length of the potential sentence in the requesting country compared to time already spent in custody, *In re Morales*, 906 F. Supp. 1368, 1374-77 (S.D. Cal. 1995); and the need to consult on a "civil suit upon which [the defendant's] whole fortune depends," *In re Mitchell*, 171 F. at 290. It makes little sense that such circumstances—but not the defendant's interest in liberty as protected by the Due Process Clause—would outweigh the government's interest in ensuring the defendant's availability for extradition.

dent, they have failed to address the due process implications of a rule permitting the deprivation of liberty without adequate justification. In the instant case, for example, although Petitioner squarely raised the issue in his initial briefs to the Ninth Circuit and then advanced it as his main argument in his petition for rehearing, the Ninth Circuit simply cited *Wright v. Henkel* and a Ninth Circuit decision applying that precedent as if they foreclosed Petitioner's due process argument.

3. "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 754 (1987); *see also Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects."). Thus, "the individual's strong interest in liberty" may "be subordinated to the greater needs of society" only "in circumstances where the government's interest is sufficiently weighty." *Salerno*, 481 U.S. at 750-51. Furthermore, because detention for punitive purposes before trial violates the Constitution, *see Salerno*, 481 U.S. at 746, 749; *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 167-69 (1963); *Bell v. Wolfish*, 441 U.S. 520, 536 n.16 (1979), pretrial detention is permitted only when it is for a regulatory purpose and the detention is not "excessive in relation to" that purpose, *Salerno*, 481 U.S. at 747 (internal quotation marks omitted); *Mendoza-Martinez*, 372 U.S. at 169.

Protecting the safety of the community against dangerous individuals and ensuring that criminal defendants will appear at their trials and to serve their sentence are "sufficiently weighty" interests to justify pretrial detention. *See Salerno*, 481 U.S. at 751 (upholding detention when the government proved by clear and convincing evidence that an individual posed "an identified and articulable threat to the individual or the community"); *Schall v. Martin*, 467 U.S. 253, 263-65

(1984) (upholding detention upon showing of "serious risk" juvenile would otherwise commit crime before trial); *Jones v. United States*, 463 U.S. 354, 368 (1983) (upholding commitment of individual found not guilty by reason of insanity in order to treat illness and to protect him and society from potential danger); *Bell*, 441 U.S. at 534 & n.15 (government's "substantial interest in ensuring that persons accused of crimes are available for trials and, ultimately, for service of their sentences" sufficient to justify pretrial detention); *Carlson v. Landon*, 342 U.S. 524, 542 (1952) (affirming detention of Communists pending deportation proceedings "where there is reasonable apprehension of hurt from aliens charged with a philosophy of violence against this Government").[7]

Similarly, in extradition cases, Petitioner agrees that the government's interest in protecting society against dangerous criminals and in ensuring that extradition defendants are available to be turned over to the requesting country if found extraditable are sufficiently weighty to support detention.

However, "the Due Process Clause requires that the nature and duration of [detention] bear some reasonable relation to the purpose for which the individual is [detained]." *Jones*, 463 U.S. at 368 (internal quotation marks deleted); *see also Salerno*, 481 U.S. at 747 ("[T]he incidents of pretrial detention" must not be "excessive in relation to the regulatory goal Congress sought to achieve"). Thus, in *Salerno*—which involved the regulatory interest most closely analogous to that asserted in extradition cases—this Court upheld detention before trial under the Bail Reform Act because, among other things, the Act limited detention to persons charged with certain serious crimes, required a showing of probable cause that the defendant had committed the charged crime, granted

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[7] However, the Court has "upheld preventive detention based on dangerousness only when limited to specially dangerous individuals and subject to strong procedural protections." *Zadvydas*, 533 U.S. at 690-91.

defendants prompt hearings, limited the time permitted for detention, and required proof at a full adversary hearing "by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person." 481 U.S. at 747-48, 750; *see also Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (characterizing *Salerno* as holding that "in certain narrow circumstances persons who pose a danger to others or to the community may be subject to limited confinement").[8]

By contrast, if there is an ill fit between the purported goal of detention and the manner in which detention is implemented, the asserted regulatory purpose is suspect and the detention violates the Constitution. Thus, for example, while the government's interest in protecting society from the danger posed by individuals acquitted of crimes on grounds of mental illness is substantial, that interest fails to support the continued detention of those individuals once they have regained their mental health or are no longer dangerous. *See Foucha*, 504 U.S. at 82 (law permitting continued detention of insanity acquittees who are not mentally ill but did not prove they are not dangerous violates due process); *Jones*, 463 U.S. at 368 (detention of defendant acquitted on grounds of mental illness no longer justified when defendant regains sanity or is no longer dangerous). Similarly, the government's interest in preventing flight of an individual ordered removed from the United States did not justify continued detention when removal was no longer practically attainable, because the "detention no longer bears a reasonable relation to the purpose for which the individual was committed."

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[8] While pretrial detention upon a lesser showing was upheld in *Schall v. Martin*, this Court emphasized the unique position of juvenile offenders in light of "the recognition that juveniles, unlike adults, are always in some form of custody" and have lesser liberty interests than adult offenders. 467 U.S. at 265-66. Moreover, the duration of detention was strictly limited. *Id.* at 269-70.

*Zadvydas*, 533 U.S. at 690 (internal quotation marks and brackets omitted).

Confinement before an adjudication of guilt must rest upon the State's regulatory interests, and the incidents of incarceration must support that regulatory purpose. *See Salerno*, 481 U.S. at 747 (reasoning that "incidents or pretrial detention" are not "excessive in relation to the regulatory goal Congress sought to achieve"); *Schall*, 467 U.S. at 270 (noting that conditions of confinement reflect State's regulatory purposes).

In the instant case, when an extradition defendant has been found to pose no flight risk and no danger to society, the government's legitimate regulatory interest in detention has insufficient force to justify the serious deprivation of liberty that detention entails. Regardless of the strength of the government's interest in ensuring a defendant's availability for extradition, that interest is not vindicated by incarcerating someone whose appearance can be assured without detention. Furthermore, the presence or absence of additional "special circumstances" do not bear at all upon this regulatory interest. *Compare Zadvydas*, 533 U.S. at 691-92 (when flight risk justification evaporates because removal not possible, "only special circumstance present is the alien's removable status itself," which does not justify detention). Those circumstances found "special," *see* note 6 *supra*, do not further either of the government's twin interests in protecting society and minimizing the risk of flight. Pretrial detention of extradition defendants will serve these interests only if release on bail depends on whether a defendant poses a threat of flight or danger, not on whether some unique additional circumstance is present.[9] District courts regularly make deter-

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[9] If the government's interest in ensuring a defendant's availability for extradition is deemed stronger than its interest in ensuring a domestic criminal defendant's appearance at trial and for sentencing, this Court could consider shifting the burden of proof and requiring extradition

minations regarding risk of flight and danger to the community in cases involving domestic criminal charges, and are well positioned to make those determinations in extradition cases.

For these reasons, the detention of an individual like Petitioner, who has been found to pose no danger to society and no risk of flight, furthers no substantial regulatory purpose and therefore violates the Due Process Clause.

4. The United States has bilateral extradition treaties with over 100 countries, in addition to the many multilateral extradition agreements to which it is a signator. *See* 18 U.S.C. §3181 note (Treaties of Extradition). More than one-quarter of these bilateral treaties were entered after 1990, *see id.*, and extradition of persons from the United States to face charges in foreign countries has become increasingly common.[10] Thus, while recent statistics are largely unavailable, it is likely that the number of defendants currently in extradition proceedings far exceeds the 338 who were the subject of extradition requests in 1982. *See* note 5 *supra*. Many of those extradited are United States citizens. *See Hearings on H.R. 5227 before the Subcommittee on Crime of the House Committee on the Judiciary*, 97th Cong., 2nd Session 36

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defendants seeking release on bail to make a stronger showing that conditions of release will assure their appearance and ensure community safety than that demanded in domestic criminal cases. However, the strength of this government interest does not support the uniform detention of extradition defendants unless they can show an additional "special circumstance" unrelated to the government's legitimate interest in preventing flight and the commission of additional crimes.

[10] *See* Nathaniel A. Persily, *International Extradition and the Right to Bail*, 34 STAN. J. INT'L L. 407 n. 110 (1998) ("[T]he number of extradition requests increases with the number of extradition treaties into which the United States enters. The proliferation of new countries and U.S. allies in the 1990s has assured a growing supply of extradition requests in recent years and for the near future.").

(1982) (statement of Roger Olsen) (10-20% of individuals extradited to foreign countries are United States nationals); note 5 *supra*.[11]

Like the lower courts in Petitioner's case, federal district courts and courts of appeal in extradition cases are blindly applying what has become viewed as the rule of *Wright v. Henkel*—that "special circumstances" above and beyond the absence of danger or flight risk are required before extradition defendants may be released on bail—without consideration of the due process implications of this rule. This Court's intervention is therefore required to address the conflict between the unexamined special circumstances rule as applied by the lower courts and this Court's due process precedent. Unless this Court grants certiorari in order to clarify the meaning of *Wright v. Henkel* and to address the due process question, the misinterpretation of this Court's precedent will preclude any division among the lower courts from ever emerging, thwarting vindication of extradition defendants' fundamental due process rights.

Moreover, the instant case presents a proper vehicle to address and resolve the issue. Petitioner raised the due process argument at every stage of the proceedings at issue. Because the Magistrate Judge found that Petitioner posed no danger or flight risk, the issue is squarely presented. And unlike many extradition defendants, who are pressured by their continued detention into giving up and submitting to extradition voluntarily before exhausting their legal remedies, Petitioner has remained in the United States while he pursues his appeal of denial of his habeas petition and the instant

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[11] For examples of extradition cases involving United States citizens, see *In re Russell*, 805 F.2d at 1217; *Leitner*, 784 F.2d at 160; *In re Burt*, 737 F.2d 1477, 1487 (7th Cir. 1984); *Freedman v. United States*, 437 F. Supp. 1252, 1254 (N.D. Ga. 1977); *United States v. Galanis*, 429 F. Supp. 1215, 1217 (D. Conn. 1977).

constitutional challenge to his detention.[12] Rather than waiting for a division of lower courts to emerge—an extremely unlikely prospect in light of the overwhelming lower court interpretation of *Wright v. Henkel*—this Court should grant certiorari to resolve the due process issue.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 20, 2006

*Counsel for Petitioner Man-Seok Choe*

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[12] Petitioner's presentation of this issue to the Supreme Court offers an unusual opportunity for this Court to address this important due process concern. Despite the prevalence of circuit court decisions holding that extradition defendants must be detained, petitions for certiorari challenging those decisions are rare. In fact, none of the extradition defendants ordered detained in the circuit court decisions cited in this petition sought certiorari.

# APPENDIX

**APPENDIX A**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CRIMINAL MINUTES—GENERAL

[Filed FEB 22, 2006]

Case No. CV-06-1544-R6K (ML6) Date February 16, 2006

Title: UNITED STATES OF AMERICA -
V- MAN-SEOK CHOE

☐ U.S. DISTRICT JUDGE

PRESENT: THE HONORABLE OSWALD PARADA

☒ MAGISTRATE JUDGE

| Maynor Galvez | N/A | 06-02 |
|---|---|---|
| Deputy Clerk | Court Reporter/Recorder | Tape No. |

ATTORNEYS PRESENT FOR PLAINTIFFS:
Daniel O'Brien

ATTORNEYS PRESENT FOR DEFENDANTS:
David Paek, Esq.
(Specially appeared for this hearing only-Retained.)

PROCEEDINGS:

ORDER RE: DETENTION AND STATUS CONFERENCE

On February 16, 2006, defendant, Man-Seok Choe, appeared before this Court for an initial appearance. In extradition cases, there is a presumption against bail and only "special circumstances" will justify bail. *See Matter of Requested Extradition of Kirby*, 106 F.3d 855 (9th Cir. 1996). No "special circumstances" have been presented to the Court. Therefore, it is hereby ordered that defendant, Man-Seok Choe, be detained without prejudice.

A status conference shall be held on March 15, 2006, at 11:00 a.m. If the government has filed its formal request for extradition prior to that date and the case is assigned to a different Magistrate Judge, the status conference shall be taken off calendar.

cc: all parties

Initials of Deputy Clerk [illegible]

**APPENDIX B**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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CASE NO. CV06-01544-RGK(MLGX)

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IN RE: THE MATTER OF THE EXTRADITION OF MAN SEOK CHOE, A FUGITIVE FROM THE REPUBLIC OF CHINA

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HONORABLE MARC L. GOLDMAN, MAGISTRATE JUDGE PRESIDING

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REVIEW OF RELEASE CONDITIONS
SANTA ANA, CALIFORNIA
APRIL 6, 2006

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|---|---|
| Court Deputy/Recorder: | Terri Steele |
| Transcribed By: | Huntington Court Reporters & Transcription, Inc.<br>1450 W. Colorado Boulevard<br>Suite 100<br>Pasadena, California 91105<br>(626) 792-7250 |

APPEARANCES:

ON BEHALF OF THE PLAINTIFF:

DEBRA WONG YANG, UNITED STATES ATTORNEY
BY: DANIEL J. O'BRIEN
411 WEST FOURTH STREET, SUITE 8000
SANTA ANA, CA 92701

ON BEHALF OF THE DEFENDANT:

NASATIR, HIRSCH, PODBERESKY, & GENEGO
BY: WILLIAM J. GENEGO
MAIN STREET LAW BUILDING
2115 MAIN STREET
SANTA MONICA, CA 90405

[3] THE CLERK: APRIL 6, 2006. U.S.A. VERSUS MAN SEOK CHOE, CASE NO. CV 06-1544-RGK (MLG), HEARING A REVIEW OF RELEASE CONDITIONS ON EXTRADITION MATTER.

(INAUDIBLE) MAGISTRATE JUDGE PRESIDING.

THE COURT: YOU MAY BE SEATED.

THIS IS CASE NO. 6-1544, THE MATTER OF EXTRADITION OF MAN SEOK CHOE. I HOPE I'M PRONOUNCING THAT RIGHT.

MR. GENEGO: I BELIEVE YOU ARE, YOUR HONOR.

THE COURT: OKAY. THANK YOU.

APPEARANCES, PLEASE.

MR. O'BRIEN: GOOD MORNING, YOUR HONOR. DANIEL O'BRIEN ON BEHALF OF THE UNITED STATES.

THE COURT: OKAY.

MR. GENEGO: GOOD MORNING, YOUR HONOR. WILLIAM GENEGO, SPELLED G-E-N-E-G-O, ON BE-

HALF OF MR. CHOE, WHO IS PRESENT IN CUSTODY (INAUDIBLE).

THE COURT: OKAY. THANK YOU, SIR.

THIS IS MATTER IS BEFORE THE COURT ON A PETITION FOR A BAIL REVIEW. THE MATTER CAME BEFORE MAGISTRATE JUDGE PARADA IN LOS ANGELES. I'M NOT SURE THE DATE. I CAN'T REMEMBER THE DATE, BUT—

MR. GENEGO: (INAUDIBLE) 16, I BELIEVE.

[4] THE COURT: THANK YOU.

AND JUDGE PARADA ORDERED THAT MR. CHOE BE DETAINED. COUNSEL HAS FILED A MOTION FOR REVIEW. I'VE READ THE MATERIAL. LET ME HEAR FROM COUNSEL.

MR. GENEGO: YOUR HONOR, INITIALLY I'D LIKE TO JUST ADDRESS TWO FACTS IN THE PRETRIAL SERVICES REPORT THAT I BELIEVE ARE IN ERROR. I UNDERSTAND THAT MR. HILL, WHO WAS THE PERSON WHO (INAUDIBLE) IS NOW PRESENT. I DID SPEAK WITH THE PRETRIAL SERVICES OFFICER WHO (INAUDIBLE) THE REPORT, BUT HE WAS UNABLE TO TELL ME THE SOURCE OF THE INFORMATION.

THE TWO PIECES OF INFORMATION IS FIRST OF ALL ON PAGE 5 AND IS (INAUDIBLE) SUPPLEMENTAL REPORT. UNDER (INAUDIBLE) THE EXPENDITURES ON THE RIGHT-HAND SIDE COLUMN.

THE COURT: RIGHT.

MR. GENEGO: THERE'S A RED FIGURE OF $29,000 WHICH GIVES (INAUDIBLE) A VERY NEGATIVE BALANCE (INAUDIBLE). THEY OWN THE BUILDING. HIS COMPANY OWNS THE BUILDING. THEY DON'T

PAY RENT AT ALL, AND SO I ASKED (INAUDIBLE) CHOE, WHO'S PRESENT IN COURT WITH HIS MOTHER AS WELL, ABOUT THAT FIGURE; AND HE DOESN'T KNOW WHERE IT CAME FROM. MR. CHOE DOESN'T KNOW WHERE IT COME FROM. THEY ACTUALLY RECEIVE RENT EVERY MONTH. IN ANY EVENT, I DON'T THINK IT WOULD ON HIS PERSONAL BALANCE [5] SHEET BECAUSE IT COMES THROUGH THE COMPANY. BUT THAT'S ONE THING.

THE COURT: ALL RIGHT. I'LL ACCEPT THAT AS ACCURATE. I'LL ACCEPT YOUR RESTATEMENT, AND IT REALLY DOESN'T MAKE A WHOLE LOT OF SENSE IN LIGHT OF EVERYTHING ELSE THAT I'VE BEEN PRESENTED SO—

MR. GENEGO: AND THEN ON PAGE 7—THIS WOULD BE AT THE END OF THE FIRST PARAGRAPH UNDER SUMMARY, SLASH, (INAUDIBLE)—THE SENTENCE READS HE HAS A WIFE AND SON, WHO ALSO RESIDE IN THE DISTRICT, PERIOD. IN ADDITION HE HAS EXTENSIVE FINANCIAL HOLDINGS IN THIS DISTRICT AS WELL AS KOREA. I HONESTLY DON'T KNOW WHAT THE SOURCE OF THAT LAST PHRASE IS, "AS WELL AS KOREA." I'VE SPOKEN WITH MR. CHOE. I'VE SPOKEN WITH HIS FAMILY (INAUDIBLE). HE DOES NOT OWN ANYTHING IN KOREA, AND I CAN'T FIND OUT WHAT THE SOURCE OF THAT WAS. BUT I BELIEVE BASED ON WHAT I'VE BEEN TOLD THAT HE DOESN'T OWN ANYTHING IN KOREA.

THE COURT: OKAY. DO YOU HAVE ANY INFORMATION, MR. O'BRIEN, IF HE OWNS ANYTHING IN KOREA?

MR. O'BRIEN: I HAVE NO INFORMATION EITHER WAY WITH RESPECT TO (INAUDIBLE).

THE COURT: OKAY. SO HAVE YOU HAD ANY DIRECT CONTACT WITH KOREAN OFFICIALS IN THIS CASE?

MR. O'BRIEN: NOT PERSONALLY, YOUR HONOR. THE [6] CONTACT (INAUDIBLE) OUR OFFICE OF IMMIGRATION (INAUDIBLE).

THE COURT: OKAY. THANK YOU, SIR.

LET ME SAY A COUPLE OF THINGS, YOU KNOW, IN LOOKING AT THIS PARTICULAR CASE. IN AN ORDINARY BAIL SITUATION, THERE'S NO DOUBT IN MY MIND THAT THERE ARE CONDITIONS OR COMBINATION OF CONDITIONS THAT WILL ENSURE THIS DEFENDANT'S APPEARANCE IN COURT, OKAY? THERE'S SUFFICIENT SURETIES, THERE'S TIES TO COMMUNITY, THERE'S NO PRIOR CRIMINAL RECORD. ALL OF THE FACTORS WHICH ARE ARTICULATED IN SECTION 3142 WEIGH IN FAVOR OF THIS DEFENDANT. IT'S AN ECONOMIC CRIME. IT DOESN'T POSE A DANGER TO THE COMMUNITY. THERE'S NOT EVEN -- FROM WHAT I UNDERSTAND, THERE'S NOT EVEN CHARGES -- HAVE BEEN FILED WHICH IS EVEN MORE INTERESTING.

WHAT I'M DEALING WITH HERE IS THE STATUTORY AND THE CASE LAW REQUIREMENT OF SPECIAL CIRCUMSTANCES. THIS ISSUE HAS COME UP IN OTHER EXTRADITION-TYPE CASES. SO REALLY THE FOCUS FOR ME IN THIS HEARING IS WHAT DOES THAT MEAN AND WHAT SPECIAL CIRCUMSTANCES EXIST IN THIS CASE. AND I'VE READ—I HAVEN'T—I'VE READ YOUR BRIEFS. I HAVEN'T READ THE CASES THAT HAVE BEEN CITED IN YOUR BRIEFS. BUT THE, YOU KNOW, THE PROBLEM APPEARS TO ME OF SPECIAL CIRCUM-

STANCES IS FAIRLY—IS PRETTY NARROWLY DEFINED BY THE COURTS WHICH REALLY TIES THE [7] HANDS OF SOMEONE HERE WHO'S LOOKING AT THE FACTS IN THIS PARTICULAR CASE AND SAYING ORDINARILY I'D SET A BOND, WHICH I WOULD.

SO THAT'S THE FRAMEWORK OF WHERE MY THINKING IS ON THIS, SO I'M GOING TO ASK COUNSEL, BOTH COUNSEL, TO ADDRESS THIS. OKAY.

MR. GENEGO: THANK YOU, YOUR HONOR. VERY HELPFUL.

EVEN THE GOVERNMENT'S BRIEF I THINK STATES THAT THE PRESUMPTION AGAINST BAIL THAT IS REFERRED TO AS THE SPECIAL CIRCUMSTANCES REQUIREMENT IS BASED ON THE NOTION THAT WE WANT TO BE ABLE TO FULFILL OUR (INAUDIBLE) CASE THAT BOTH THE GOVERNMENT AND I CITE, AND THE GOVERNMENT MAKES THAT POINT, AND I THINK IT'S A GOOD ONE. THE DISCONNECT, IF YOU WILL, BETWEEN THAT STATEMENT AND A SPECIAL CIRCUMSTANCES IS THAT, WELL, IF THAT IS WHAT YOU'RE UNDERLYING PURPOSE WAS IN REQUIRING SPECIAL CIRCUMSTANCES YOU WOULD THINK THAT THE SPECIAL CIRCUMSTANCES WOULD SOMEHOW RELATE OR TIE BACK TO THE DEGREE OF CERTAINTY THE PERSON WHO IS GOING TO NOT FLEE. BUT THERE DOES SEEM TO BE A DISCONNECT THERE BECAUSE THEY THEN GO ONTO SAY THAT THAT'S SOMETHING YOU NEED IN ADDITION TO SPECIAL CIRCUMSTANCES. SO IF YOU THINK ABOUT WHY IT CAME ABOUT, I THINK THAT YOU LOOK TO FLIGHT AND THAT WOULD BE SATISFIED HERE. BUT IF THERE'S [8] (INAUDIBLE) CASE ADDRESS THAT, THERE IS ONE SERVING CASE IN

WHICH THE OPINION HAS BEEN WITHDRAWN WHERE THEY WENT THROUGH THE ENTIRE HISTORY OF THE SPECIAL CIRCUMSTANCES (INAUDIBLE).

THE COURT: I REMEMBER THAT (INAUDIBLE).

MR. GENEGO: EXACTLY. AND I ACTUALLY HANDLED THAT CASE (INAUDIBLE).

THE COURT: I THOUGHT YOU DID.

MR. GENEGO: I'M VERY FAMILIAR WITH (INAUDIBLE). IT'S WITHDRAWN OPINIONS, BUT I DID NOT CITE IT.

THE COURT: UH-HUH.

MR. GENEGO: BUT IT DOES HAPPEN ENTIRE HISTORY. THE COURT: I REMEMBER IT'S A CASE BEING OUT THERE THE LAST TIME I DID THIS, BUT I COULDN'T FIND IT SO—

MR. GENEGO: WELL, WHAT HAPPENED WAS THAT MR. PARADE [PHONETIC] FORTUNATELY DECIDED TO GO BACK TO ITALY AND (INAUDIBLE—

THE COURT: OKAY. WE'RE NOT GOING TO "FLED;" RIGHT?

MR. GENEGO: NO. HE GOT (INAUDIBLE) DUE TO WORK (INAUDIBLE).

THE COURT: OKAY. ALL RIGHT.

MR. GENEGO: SO—WHICH IS UNIMPORTANT.

[9] BUT BE THAT AS IT MAY, IT DOES HAVE A VERY HELPFUL DISCUSSION OF THE HISTORY OF THE SPECIAL CIRCUMSTANCES TEST.

IN THIS CASE I THINK THAT WE DO HAVE SPECIAL CIRCUMSTANCES. I THINK THE COURTS

HAVE COME TO LOOK UPON THIS IN A MORE SORT OF COMMON SENSE WAY. IT STARTED BACK IN 1912, THE U.S. SUPREME COURT CASE, AND THEN HAD NEVER REALLY BEEN EXAMINED CAREFULLY ABOUT WHY WE REQUIRE THIS AND THAT SORT OF DISCONNECT THAT I MENTIONED BEFORE.

BUT I THINK IF YOU LOOK AT THE DISTRICT COURT CASES, THEY HAVE COME TO REALIZE THAT WHAT WE'RE LOOKING AT HERE IS REALLY OUR ABILITY TO SATISFY THE TREATY OBLIGATION AND HAVE NOT BEEN AS RIGOROUS AND PERHAPS (INAUDIBLE) EARLIER YEARS ABOUT HAVING SOME SORT OF DEFINING OR INCREDIBLY SIGNIFICANT SPECIAL CIRCUMSTANCE AND THAT REALLY I THINK WE'VE CITED THE CASE WHERE THEY SAY IT DOESN'T MATTER IF THERE'S WEAK SPECIAL CIRCUMSTANCES AS LONG AS THERE ARE SPECIAL CIRCUMSTANCES. AND IT'S WITH THAT FRAMEWORK THAT I THINK THE COURTS HAVE COME TO ADDRESS THIS BECAUSE WHEN YOU THINK ABOUT IT, THE CRIME IN THIS CASE—AND I'M GOING TO GET BACK TO THAT IN THE MOMENT—HAPPENED BACK IN THE EARLY '90S. HE'S BEEN LIVING IN THE UNITED STATES SINCE THE '70S. HE HAS NOT TRAVELED OUTSIDE THE [10] COUNTRY SINCE 1997, AND HE'S A BUSINESSMAN. HE'S A SUCCESSFUL MAN, AND ALL OF A SUDDEN ONE DAY WITHOUT ANY PRIOR CRIMINAL RECORD HE GETS PULLED OUT OF HIS HOUSE EARLY IN THE MORNING LOCKED IN HANDCUFFS, AND HE CAN'T EVEN PUT ON HIS READING GLASSES THIS MORNING BECAUSE HE'S HANDCUFFED, AND WE HAD TO DO IT FOR HIM. SO WHEN YOU THINK OF WHAT THAT REALLY DOES TO SOMEONE JUST BECAUSE IT'S AN EXTRADITION CASE. AND THAT'S A PRETTY DRASTIC DEPRAVATION OF LIBERTY

THAT SOMEONE UNDERGOES FOR SOMETHING THAT HAPPENED A LONG TIME AGO SIMPLY BECAUSE IT'S ANOTHER COUNTRY.

SO I THINK COURTS HAVE COME TO UNDERSTAND THAT YOU HAVE TO LOOK AT THIS IN A MORE PRACTICAL WAY, AND CERTAINLY THE WORLD IS A FAR DIFFERENT PLACE NOW THEN IT WAS IN 1912 WHEN THEY CAME UP WITH THE SPECIAL CIRCUMSTANCES TEST.

BE THAT AS IT MAY, I THINK THAT WE DO HAVE A HEALTH PROBLEM HERE, AND THE GOVERNMENT SAYS, WELL, WE DON'T HAVE ANY EVIDENCE THAT HIS HEALTH IS DETERIORATING. WELL, THAT'S SORT OF A CATCH 22 BECAUSE HE HAS FILED AND SUBMITTED A MEDICAL REQUEST FOR A MEDICAL EXAM BECAUSE HE HAS TOLD HIS COUNSELOR THAT HE'S GOT A BACK PROBLEM. IT'S BECOME MUCH WORSE. IT'S NOT SOMETHING THAT HE'S MADE UP. I MEAN, THERE'S DOCUMENTED MEDICAL REPORTS—AND WE CAN ELABORATE UPON THOSE, BUT [11] I JUST DIDN'T WANT TO SUBMIT THE ENTIRE HISTORY OF HIS MEDICAL RECORDS. BUT HE HAS A DOCUMENTED BACK CONDITION, AND IT IS NOT A I THINK TOO MUCH OF A STRETCH TO BELIEVE THAT WHEN YOU'RE IN CUSTODY IN THE METROPOLITAN DETENTION CENTER AND YOU'RE NOT GETTING TREATMENT, YOU'RE NOT GETTING EXERCISE, AND YOU'RE PROBABLY HAVE NOT A VERY GOOD MATTRESS PLUS YOU'RE PRETTY STRESSED I WOULD BELIEVE THAT YOUR BACK CONDITION IS GOING TO GET WORSE. AND SO IT'S A MEDICAL CONDITION, AND I THINK THE (INAUDIBLE) AT LEAST HIS REPORTING TO THE OFFICIALS AT MDC

IS CONFIRMATION THAT HIS BACK HAS DETERIORATED. THAT'S A SPECIAL CIRCUMSTANCE.

THE GOVERNMENT ALSO DISPUTES OUR CLAIM THAT A PERSON'S CHARACTER OR BACKGROUND CAN ESTABLISH A SPECIAL CIRCUMSTANCE AND THERE ARE CASES WHICH SUGGEST THAT AT LEAST THE (INAUDIBLE)—

THE COURT: SUGGEST WHAT? WHICH WAY?

MR. GENEGO: THAT CHARACTER MAY BE CONSIDERED. I THINK THE MOLINA [PHONETIC] CASE THAT I CITED. AND I THINK WHAT THEY SAY IS THAT STANDING ALONE PROBABLY NOT ENOUGH, BUT IT'S CERTAINLY SOMETHING THAT THE COURT CAN TAKE INTO CONSIDERATION, AND IN THAT SPIRIT I WOULD OFFER IT AS IN THIS CASE AS WELL BECAUSE I THINK IT DOES PLAY THAT ROLE. HERE'S SOMEONE WHO'S BEEN IN THIS COUNTRY SINCE 1997—

[12] THE COURT: BEFORE THAT; RIGHT? HE'S BEEN IN THE COUNTRY SINCE 1970.

MR. GENEGO: 1970. THAT'S RIGHT.

THE COURT OKAY.

MR. GENEGO: I MISQUOTED. 1970.

HE'S GOT A FAMILY. HE'S APPLIED TO BE A U.S. CITIZEN. HIS WIFE AND HIS SON ARE BOTH U.S. CITIZENS, AND HE HAS BECOME A VERY SUCCESSFUL PERSON OF THE COMMUNITY. AND HE—HIS LOVE FOR THIS COUNTRY IS DEMONSTRATED BY THE WORK HE'S DONE HERE, THE SUCCESS HE'S MADE, THE PROPERTY THAT HE'S OWNED, AND THE BURIAL CITE, AND HE WANTS TO BRING HIS RELATIVES OVER FROM KOREA TO COME BACK HERE AND BE BURIED. AND I'M SURE AS THE

COURT SAW THAT WAS NO SMALL EXPENDITURE THAT THEY PAID FOR THAT GRAVESITE, AND IT'S A PRETTY MAGNIFICENT LOCATION, AND THAT IS ALSO ANOTHER SPECIAL CIRCUMSTANCE THAT I LISTED HERE. AND THE GOVERNMENT SAYS WE HAVE NO AUTHORITY FOR THAT, BUT IN FACT THE CASES SAY THAT THE LIST OF SPECIAL CIRCUMSTANCES IS NOT FINITE THAT EACH CASE IS DIFFERENT AND IF THERE'S SOMETHING THAT IS REALLY EXTRAORDINARY OR SPECIAL ABOUT A CASE, YOU CAN DO THAT. AND I THINK THE GRAVESITE IS CERTAINLY THAT. WHAT GREATER ASSURANCE COULD ONE HAVE THAT THEY ARE NOT GOING TO BE FLEEING THE UNITED STATES THAN TO PUT CLOSE TO THREE QUARTERS OF A MILLION DÓLLARS INTO A BURIAL [13] SITE HERE. THIS IS A PRETTY STRONG—AND THIS IS BEFORE HE KNEW ANY ABOUT THIS OF COURSE. IT'S A PRETTY STRONG TESTAMENT TO SOMEONE'S COMMITMENT TO THE COMMUNITY AND NOT FLEE, AND I THINK WOULD GET TO THE HEART THE SPECIAL CIRCUMSTANCES REPORT WHICH IS TO MAKE SURE THAT HE'S GOING TO BE AVAILABLE TO SURRENDER.

ANOTHER SPECIAL CIRCUMSTANCE HERE THAT RELATES TO THAT I SUPPOSE IS EVEN ACCORDING TO THE KOREAN GOVERNMENT HE FLED TO THE UNITED STATES. SO THIS IS WHERE HE WANTS TO BE, NOT KOREA. SO THAT'S ANOTHER FACTOR THAT I THINK PLAYS HERE IN HIS FAVOR MAYBE MORE THAN THE (INAUDIBLE) AREA, BUT NEVERTHELESS IT'S SOMETHING THAT'S ATYPICAL.

THE COURT: LET ME ASK A QUESTION BECAUSE I'M NOT THAT FAMILIAR WITH THE ALLEGATIONS OF THE UNDERLYING CRIMINAL CONDUCT IN

KOREA. WAS HE THERE—WAS HE LIVING THERE AT THE TIME OR, YOU KNOW, WORKING ON THE DEALS OR WAS HE THERE VISITING AND THEN CAME BACK HOME? I MEAN, THERE'S THIS—YOU KNOW, THE GOVERNMENT CAN SAY FLED. DEFENDANT CAN SAY CAME BACK HOME; ALL RIGHT? SO—

MR. GENEGO: THAT'S PRECISELY THE POINT. AND LET ME GET TO THAT POINT BECAUSE I WANT TO TALK ABOUT IT.

THE COURT: ALL RIGHT.

[14] MR. GENEGO: (INAUDIBLE) MR. O'BRIEN CAN AND I'M SURE WILL CORRECT ME IF I MISSPEAK, BUT THIS IS MY UNDERSTANDING OF WHAT THE ALLEGATIONS ARE:

HE'S BEEN LIVING HERE AND HAS HAD A GREEN CARD SINCE 1970. HE CONTINUES TO DO SOME BUSINESS IN KOREA, WHICH HE HAS NOW ENDED. AND IN THE LATE '80S KOREA SAID THEY WERE GOING TO DEVELOP THIS HIGH-SPEED RAIL SYSTEM AND IT WAS GOING TO BE PUT OUT FOR BID. THERE WERE THREE COMPANIES THAT WERE IN THE BID. ONE WAS A FRENCH COMPANY, WHO IS (INAUDIBLE); THERE WAS ALSO THE JAPANESE COMPANY, MITSUBISHI; AND THEN THERE WERE THE GERMAN COMPANY, (INAUDIBLE); ALL OF WHOM WERE GOING TO BID.

THE PRESIDENT OR SOMEONE ASSOCIATED WITH (INAUDIBLE) CAME TO MEET A KOREAN WOMAN WHO WENT TO A FORTUNE TELLER, AND THIS WAS IN THE (INAUDIBLE). AND THEY—THE FORTUNE TELLER SAID SHE SHOULD GO TO MR. CHOE AS THE PERSON TO TALK TO ABOUT BEING YOUR LOBBYIST.

THE COURT: I'M SORRY. YOU KNOW, THIS IS A BILLION DOLLAR DEAL, AND WE'RE DEALING WITH FORTUNE TELLERS HERE SO—

MR. GENEGO: WELL, THAT'S HOW IT—

THE COURT: ALL RIGHT.

MR. GENEGO: THAT'S HOW IT COMES ABOUT.

THE COURT: OKAY.

[15] MR. GENEGO: THAT'S HOW THE RELATIONSHIP BEGINS.

THE COURT: OKAY.

MR. GENEGO: FROM THE FORTUNE TELLER. AND MAYBE SHE KNEW MORE THAN FORTUNES OR MAYBE SHE DID KNOW THE FORTUNES, BUT SHE SAID THIS IS THE MAN THIS IS YOU WANT TO SPEAK, MR. CHOE. SO THIS IS BACK IN 1992, '93 WHEN THEY BEGIN TO—HE BEGINS TO LOBBY, AND AS FAR AS I KNOW, NO ONE SAYS THAT'S A CRIME. AND IT'S CERTAINLY NOT A CRIME HERE, BUT THEY'RE CUTTING BACK A LITTLE BIT. AND IT'S CERTAINLY NOT A CRIME IN KOREA, AND NO ONE ALLEGES THAT THAT'S A CRIME.

WHAT HAPPENS IS HE MAKES AN ARRANGEMENT WITH (INAUDIBLE), WHICH IS THE FRENCH COMPANY, WHERE IF THEY GET THE DEAL, HE GETS 1 PERCENT. STRAIGHT UP. NO ONE DISPUTES THAT. THEY GET THE DEAL, HE GETS 1 PERCENT. IT'S A $11 MILLION.

(INAUDIBLE) CONTACT. THEY WIRE THAT MONEY FROM THEIR ACCOUNT IN FRANCE TO HIS ACCOUNT IN HONG KONG UNDER HIS NAME, AND HE THEN TAKES SOME OF THAT MONEY AND WIRE TRANSFERS IT TO THE WOMAN WHO FIRST CONTACTED HIM ABOUT THE DEAL, AND I THINK

THAT I MAY HAVE THAT PERSON (INAUDIBLE), BUT HE SPLITS—PARTIALLY SPLITS THAT COMMISSION WITH SOMEONE ELSE. HERE'S WHERE THAT ALLEGED CRIME (INAUDIBLE).

[16] NOW, ALL OF THOSE TRANSFERS ARE DOCUMENTED IN THE PAPERWORK. WE HAVE BANK RECORDS. WE HAVE WIRE TRANSFERS. WE HAVE AMOUNTS. THEY ARREST THE WOMAN I BELIEVE AND ALSO QUESTION THE MAN FROM (INAUDIBLE). THEY ALSO QUESTION MR. CHOE AT ONE POINT.

DURING THOSE CONVERSATIONS, THE WOMAN I BELIEVE SAYS THAT PART OF THEIR PLAN WAS TO PAYOFF ONE OF THE LEGISLATURES SO THAT THEY WOULD BE—FAVORABLE ACTION WAS TAKEN ON BEHALF OF (INAUDIBLE) RATHER THAN THE OTHER TWO COMPANIES. AND THEY IDENTIFIED—SHE IDENTIFIED THE NAME OF THE LEGISLATURE, AND HIS NAME I THINK IS SPELLED HWANG, H-W-A-N-G, I BELIEVE. AND SO THE ALLEGATION AND THEN ALLEGED CRIME IS THAT HE PAID 400,000 WON TO MR. HWANG AND THAT'S THE CRIME. NOT THE LOBBYING, NOT THE SPLITTING OF THE COMMISSION BUT THE $400,000 (INAUDIBLE).

NOW, INTERESTINGLY—AND AGAIN MR. O'BRIEN WILL CORRECT ME IF I'M WRONG—THERE'S NO SOURCE OF THAT PAYMENT. I MEAN, IT SAID IN THE PAPERS IN THE PROSECUTOR'S SUMMARY THAT MR. HWANG AND DIFFERENT FAMILY MEMBERS GOT DIFFERENT PAYMENTS AMOUNTING TO $400,000 IN WON, BUT IT'S UNCLEAR WHO PROVIDED THAT INFORMATION AND THERE'S NO DOCUMENTS THAT SUPPORT THAT PART OF THE ALLEGATIONS, WHICH IS REALLY THE CRIME. THE OTHER STUFF IS NOT THE CRIME, WHICH IS DOCUMENTED.

[17] NOW, ANOTHER INTERESTING THING IS THAT THE TWO PEOPLE WHO PROVIDED THE INFORMATION AND ADMITTED THEY WERE INVOLVED IN THE SCHEME, THEY BOTH GET SUSPENDED SENTENCES. MR. HWANG, WHO'S THE POLITICIAN WHO SUPPOSEDLY GOT THE BRIBE WHO DOESN'T ADMIT IT, HE GETS FIVE YEARS. SO THAT'S—THAT'S ONE—THAT'S THE FIRST CRIME. THAT'S WHERE THE (INAUDIBLE) TO GET THE CONTRACT. AND ON THAT I THINK THAT WE HAVE SUBSTANTIAL LIKELIHOOD OF PREVAILING NOT ONLY FOR THE REASONS THAT I MENTIONED IN MY PAPERS ABOUT THERE BEING NO (INAUDIBLE). BUT GOING BACK OVER THIS, I THINK THAT THERE'S A REAL QUESTION ABOUT PROBABLE CAUSE THERE BECAUSE WE DON'T KNOW THE SOURCE OF THE INFORMATION FOR THE PAYMENT OF $400,000—400,000 WON. AND IF IT TURNS OUT THAT THE ONLY SOURCE OF THAT INFORMATION IS THE PEOPLE WHO GOT PROBATION, THERE IS CASE LAW—AND I'LL BRIEF THIS TO THE COURT LATER ON—THAT DOES SAY THAT THE COURT CAN MAKE A CREDIBILITY DETERMINATION, AND I THINK IT'S OBLIGATED TO MAKE A CREDIBILITY DETERMINATION.

SO WE WOULD HAVE TO FIND OUT THE SOURCE OF THAT INFORMATION, AND IF THERE'S DOCUMENTARY RECORDS OF THAT, THEN I STAND CORRECTED. BUT I HAVE NOT SEEN THEM IN THE PAPERS THAT I'VE GONE THROUGH SO FAR. AND IF THAT REMAINS TO BE THE CASE, THEN I THINK WE'VE GOT A SERIOUS ISSUE ABOUT PROBABLE CAUSE. THAT'S ONE CRIME.

[18] THE SECOND CRIME IS HOW THIS WHOLE THING COMES ABOUT SUPPOSEDLY. AND THAT IS

IN 1997. I BELIEVE SOMEONE LOOKED AT A LARGE WIRE TRANSFER GOING INTO HIS ACCOUNT IN HONG KONG. AND THEY WANT TO—THEY THINK IT'S DRUG MONEY BECAUSE IT'S HONG KONG, IT'S 1997, IT'S OVER A MILLION DOLLARS. THEY BEGIN AN INVESTIGATION INTO THAT MONEY. AND THE CRIME THAT OCCURRED THERE SUPPOSEDLY IS THAT MR. CHOE AND THIS OTHER WOMAN WHO WAS INVOLVED IN THE ORIGINAL NEGOTIATIONS SUPPOSEDLY PAYOFF ONE OF THE POLICE OFFICERS TO CLOSE THE INVESTIGATION. AND AGAIN I DON'T SEE ANY DOCUMENTS SUPPORTING TEE PAYMENT TO THE POLICE OFFICER. THERE WAS THE ALLEGATION THAT PAYMENTS WERE MADE TO CLOSE DOWN THE INVESTIGATION, BUT—

THE COURT: THIS IS THE—IS—DOES THE PEOPLE'S REPUBLIC OF CHINA OR HONG KONG HAVE EXTRADITION PROCEEDINGS? I MEAN, HOW WOULD THAT BE A KOREAN—

MR. GENEGO: WELL, I THINK WHAT THE IDEA WAS THAT HE PAID THEM OFF IN THE KOREA EVEN THOUGH THE MONEY WENT INTO THE—

THE COURT: OKAY. ALL RIGHT.

MR. GENEGO: —(INAUDIBLE.) I THINK THEY ASSERTED JURISDICTION OVER THE PAYMENT MAYBE BECAUSE WHEN HE CAME INTO THE WOMAN IT WAS $3 MILLION AND THAT'S HOW THEY GOT TO—I DON'T KNOW THE (INAUDIBLE) —

THE COURT: ALL RIGHT. OKAY.

[19] MR. GENEGO: (INAUDIBLE.)

THE COURT: BUT THAT IS PART OF THE KOREAN INVESTIGATION?

MR. GENEGO: THAT'S EXACTLY RIGHT. I SHOULD HAVE MADE THAT CLEAR.

THE COURT: ALL RIGHT.

MR. GENEGO: IT WAS (INAUDIBLE) HONG KONG AUTHORITIES THAT WERE MAKING THIS.

THE COURT: OKAY.

MR. GENEGO: IT WAS THE KOREAN AUTHORITIES WHO WERE MAKING THE INVESTIGATION. AND ONE THING I DO REMEMBER FROM THE PAPERS IS THAT IT'S SOMEONE ASSOCIATED WITH THE (INAUDIBLE).

THE COURT: OKAY.

MR. GENEGO: SO MAYBE (INAUDIBLE). IN ANY EVENT THE ALLEGATION IS THAT HE PAYS OFF A POLICE OFFICER IN KOREA TO SHUT DOWN THE INVESTIGATION AND TO HAVE IT END THERE. AND THAT AGAIN I DON'T THINK IS SUPPORTED BY ANY DOCUMENTS, AND WE DON'T REALLY KNOW THE SOURCE THE INFORMATION OTHER THAN THE WOMAN WOULD GOT PROBATION. THAT'S MY UNDERSTANDING OF HOW IT IS. AS I SAID, I WANT TO BE CAREFUL OF THAT. I DO NOT CONSIDER MYSELF TO HAVE GONE THROUGH THESE PAPERS AS CAREFULLY AS I WOULD HAVE LIKED BEFORE MAKING THESE CERTIFICATIONS, BUT I'M FAIRLY CONFIDENT THAT THEY ARE SUPPORTED BY THE [20] PAPERS AS I SAID I'M SURE MR. O'BRIEN WILL CORRECT ME.

THE THIRD CRIME IS LEAVING THE COUNTRY AGAINST THE PROHIBITION. AND THERE'S TWO PROBLEMS WITH THAT, AND THE REASON I THINK WE HAVE A SUBSTANTIAL LIKELIHOOD AS TO PREVAILING AS TO THAT PARTICULAR CRIME IS

THAT THIS IS ON PAGE 98 OF THE GOVERNMENT'S FORMAL PAPERS. IT'S THE ACTUAL PROHIBITION AGAINST DEPARTURE. HIS DEPARTURE WAS PROHIBITED FOR ONE MONTH. IT SAYS RIGHT HERE SEPTEMBER 28, 1999, TO OCTOBER 27, 1999. AND THERE'S NOTHING ELSE TO SAY IT EXTENDED BEYOND THAT. SO I DON'T THINK THERE'S ANY PROHIBITION AGAINST HIM LEAVING AFTER THAT TIME. IF THE CRIME IS THAT HE LEFT WITHOUT A PASSPORT BECAUSE THEY DID CONFISCATE HIS PASSPORT WHICH ALSO MEANS THAT HE CAN'T TRAVEL (INAUDIBLE) BUT IF THAT'S THE CRIME, THEN I THINK THERE'S A DUAL CRIMINALITY PROBLEM BECAUSE I DON'T THINK THAT THERE'S A U.S. CRIME THAT SAYS LEAVING THE COUNTRY IS A—

THE COURT: WAS HE CARRYING A KOREAN PASSPORT?

MR. GENEGO: PARDON?

THE COURT: HE WAS CARRYING—HE HOLDS A KOREAN PASSPORT?

MR. GENEGO: (INAUDIBLE.)

THE COURT: SOME KOREAN PASSPORT?

MR. GENEGO: (INAUDIBLE) AT THE TIME. THE [21] ALLEGATION IS THAT HE LEFT THE COUNTRY SOMEHOW WITHOUT A PASSPORT.

THE COURT: OKAY.

MR. GENEGO: AND I DON'T KNOW THAT IT'S—I DON'T THINK IT'S A CRIME AT LEAST AS FAR AS I KNOW IT'S NOT A CRIME TO LEAVE THE UNITED STATES WITHOUT A PASSPORT. YOU CAN CERTAINLY GO TO MEXICO WITHOUT A PASSPORT. YOU CAN GO TO CANADA WITHOUT A PASSPORT.

IT'S HARD TO GET PLACES THERE AFTER YOU DO THAT, BUT I DON'T KNOW THE U.S. CRIME LIKE THAT AND IF SO THERE'S NO DUAL CRIMINALITY. SO I THINK AS TO THAT PARTICULAR PROBLEM, YOU'VE GOT BOTH THE PERIOD OF DEPARTURE ONLY LASTING A MONTH AND THEN YOU ALSO HAVE THE DUAL CRIMINALITY PROBLEM.

AS TO THE OTHER TWO CRIMES, YOU'VE GOT THE QUESTION ABOUT PROBABLE CAUSE AS WELL AS THIS NOT BEING—THERE BEING NO CHARGES FILED ACTUALLY IN KOREA. SO I THINK ALL OF THOSE THINGS CERTAINLY MAKE THIS A CASE IN WHICH—

THE COURT: SO LET ME ASK THIS: IS IT YOUR ARGUMENT THAT THE WEIGHT OF THE EVIDENCE MIGHT BE A SPECIAL CIRCUMSTANCE?

MR. GENEGO: I THINK THAT IT IS AND I THINK THAT SOLARO [PHONETIC], WHICH IS A NINTH CIRCUIT (INAUDIBLE) —

[22] THE COURT: YEAH.

MR. GENEGO: —WHERE THEY TALK ABOUT SUBSTANTIAL LIKELIHOOD IS SOMETHING THAT SHOULD BE—AND IT MAKES SENSE BECAUSE IF THERE IS SOMETHING SERIOUSLY WRONG WITH THE CHARGES EVEN FROM A PRELIMINARY VIEW, THAT WOULD CERTAINLY MAKE IT SEEM MORE FAIR AND RIGHT TO LOOK AT THE CASE DIFFERENTLY AND TO CONSIDER HIM FOR BAIL ASSUMING HE'S NOT A FLIGHT RISK AND A DANGER. SO I THINK THAT DOES MAKE A LOT OF SENSE.

THE OTHER THING THAT SEGUES INTO I BELIEVE IS THE PERIOD OF TIME OF HE'S GOING TO HAVE BE IN CUSTODY. THIS IS GOING TO BE I THINK A

LITTLE DIFFERENT THAN A LOT OF OTHER EXTRADITION CASES IN THAT THERE'S GOING TO BE ISSUES ABOUT PROBABLE CAUSE, THERE'S GOING TO BE ISSUES ABOUT IMMUNITY, ABOUT DEALS MADE, WHY THESE PEOPLE GOT PROBATION AND THAT'S GOING TO BE—I THINK THAT THERE'S CASE LAW WHICH SUPPORTS THE PROPOSITION THAT WE HAVE THE RIGHT TO AT LEAST LIMITED DISCOVERY AND THAT THE COURT IS ENTITLED TO INFORMATION OR TO AID IN MAKING THE PROPER (INAUDIBLE) DETERMINATION.

SO I WOULD THINK THAT—THIS BASED ON MY EXPERIENCE ANYWAY—THIS IS GOING TO TAKE A LITTLE BIT OF TIME TO LITIGATE AND IS UNLIKELY TO BE RESOLVED IN FIVE MONTHS. BUT EVEN IF YOU JUST TAKE THE FIVE MONTHS, WHEN YOU CONSIDER SOMEONE LIKE MR. CHOE, WHO HAS NEVER [23] BEEN INVOLVED WITH CRIMINAL PROCEEDINGS—

THE COURT: HOW OLD IS MR. CHOE?

MR. GENEGO: 60—HE WAS BORN IN 19—

THE WITNESS: 65.

MR. GENEGO: 65, OKAY. I WASN'T SURE IF IT WAS 65 OR 66.

THE COURT: HE'S 65 YEARS OLD.

MR. GENEGO: 65 YEARS OLD.

THE COURT: OKAY.

MR. GENEGO: HE'S GOT NO CRIMINAL RECORD. HE'S AN OUTSTANDING BUSINESSMAN. I MEAN, FIVE MONTHS FOR SOMEONE LIKE THAT WHO'S GOT A BACK CONDITION IS A PRETTY DRASTIC AND SEVERE DEPRAVATION OF LIBERTY. AND I

KNOW THE GOVERNMENT SAYS, WELL, THE CASE IN WHICH THEY FOUND THAT WAS TWO YEARS. WELL, AGAIN I THINK EACH CASE HAS TO BE ADDRESSED ON ITS INDIVIDUAL MERITS, AND I THINK THAT FOR SOMEONE IN MR. CHOE'S CIRCUMSTANCE TO BE DETAINED IN THE METROPOLITAN DETENTION CENTER WITHOUT ANY CHANCE AT ALL EVEN IF WE COULD LOOK INTO THE FUTURE AND ACTUALLY KNEW THAT HE WAS GOING TO STAY HERE—AND I THINK THAT WE'VE COME PRETTY CLOSE TO THAT ALTHOUGH NOTHING IS EVER CERTAIN—HE STILL HAS TO SIT IN MDC FOR AT LEAST FIVE MONTHS, AND THAT IS A REAL SUBSTANTIAL DEPRAVATION OF HIS LIBERTY, AND I THINK THAT WOULD CONTRIBUTE TO THE COURT'S ABILITY TO FIND SPECIAL [24] CIRCUMSTANCES.

THE COURT: OKAY. MR. O'BRIEN.

MR. O'BRIEN: THERE'S A LOT TO RESPOND TO HERE, BUT I'D LIKE TO FIRST SIMPLY SAY THAT HALF OF WHAT (INAUDIBLE) HERE IS NOT DIRECTED (INAUDIBLE) PROCEEDINGS FROM PROFFERS OF EVIDENCE THAT (INAUDIBLE) SUBMITTED TO THE COURT. AND THE EVIDENCE THAT'S BEFORE THE COURT NOW, WHICH I'D LIKE TO PROFFER NOW ARE THE COMPLAINT, AFFIDAVIT (INAUDIBLE) SUBMITTED TO THE COURT (INAUDIBLE) ARREST WARRANT. ALSO THE EXTRADITION PAPER THAT I FILED WITH THE COURT, THE RECENT SUPPLEMENTAL WARRANTS THAT I FILED WITH THE COURT, AND THE THREE (INAUDIBLE).

ALL OF THIS DISCUSSION (INAUDIBLE) COMING FROM DEFENSE COUNSEL ABOUT WHAT THE FACTS WERE (INAUDIBLE) IS NOT IN THE RECORD. NONE OF IT AND THE GOVERNMENT DOESN'T (INAUDI-

BLE) AND LITERALLY THAT WAS ABOUT HALF OF WHAT HIS ARGUMENT WAS BEFORE THE COURT IT DOESN'T EXIST FACTUALLY BEFORE THIS COURT. TAKING THE—

THE COURT: SO WHAT DOES EXIST FACTUALLY BEFORE THE COURT? HOW'S THE COURT EVALUATE IT?

MR. O'BRIEN: I COULD DO IT THIS WAY IN RESPONDING TO THE VARIOUS ARGUMENTS THAT DEFENSE COUNSEL HAS MADE, I COULD REFERENCE EVIDENCE THAT'S BEFORE THE COURT (INAUDIBLE).

THE COURT: WHICH IS THE—

[25] MR. O'BRIEN: THE AFFIDAVIT IN SUPPORT OF THE ARREST WARRANT.

THE COURT: UH-HUH.

MR. O'BRIEN: IT'S IN THE EXTRADITION PAPERS. THE COURT: RIGHT. OKAY.

MR. O'BRIEN: (INAUDIBLE), THE ARREST WARRANT, THE SUPPLEMENTAL ARREST WARRANT, AND OF COURSE THE PRETRIAL SERVICES REPORT.

THE FIRST ISSUE THAT WE'RE DISCUSSING HERE IS WHETHER THERE ARE SPECIAL CIRCUMSTANCES. I UNDERSTAND WHAT THE COURT'S TENTATIVE VIEW IS WITH REGARD TO FLIGHT RISK. I'D LIKE TO SPEAK TO THAT LATER.

THE COURT: I'LL LET YOU.

MR. O'BRIEN: BUT WITH RESPECT TO SPECIAL CIRCUMSTANCES, FIRST OF ALL THE LAW IS CLEAR, AND IT'S NOT GOING BACK TO 1912 (INAUDIBLE). THE SOLARO OPINION WAS ISSUED IN 1989. IT'S VERY CLEAR WHAT THE LAW IS IN THIS

CASE. SPECIAL CIRCUMSTANCES IS NOT FLIGHT RISK. (INAUDIBLE) COMPLETELY SEPARATE ISSUES. SOLARO ALSO INDICATED WHAT TYPE OF CIRCUMSTANCES WOULD CONSTITUTE SPECIAL CIRCUMSTANCES, AND IT'S SIMPLY NOT A PRESUMPTION FOR A BURDEN ISSUE. THE DEFENSE MUST SHOW THE SPECIAL (INAUDIBLE) SPECIAL CIRCUMSTANCES THAT EXIST OUT OF THE USUAL EXTRADITION CASE, AND THIS IS NOTHING BEYOND THE USUAL EXTRADITION CASE BECAUSE THE DEFENSE HAS NOT [26] POINTED OUT ANYTHING SPECIAL HERE. HE'S RELIED UPON FIVE THINGS AND FIVE THINGS ONLY IN HIS BRIEF.

THE FIRST ONE WAS (INAUDIBLE) ISSUE, AND THE GOVERNMENT STATES RIGHT NOW THAT THE GOVERNMENT BELIEVES THAT THERE'S AN EXAGGERATION OF THE DEFENDANT'S MEDICAL CONDITION FOR THE PURPOSES OF THE PROCEEDINGS. SO THOSE OF US WHO HAVE BACK INJURIES READ IN WHAT WAS SUBMITTED IN THE DOCTOR'S REPORT. THIS IS NOT A UNIQUE BACK SITUATIONS. BACK SITUATIONS ARE OFTEN CHRONIC, OFTEN CANNOT BE DEALT WITH, AND PEOPLE HAVE TO LIVE WITH THE PAIN ASSOCIATED WITH THAT. AND I REFERENCED IN THE REPORT WHERE THE DEFENDANT HAS BEEN ON SOMETIMES VICODIN (INAUDIBLE) PRESCRIPTION MEDICATION, SOMETIMES ASPIRIN (INAUDIBLE) TAKING OVER THE COUNTER. HE WAS GIVEN THE OPTION OF INVESTIGATING THE POSSIBLE OF SURGERY, AND HE ELECTED NOT TO PURSUE THAT. AND THEN FOR HIM TO SAY, BASED UPON COUNSEL'S REPRESENTATION AND ONLY COUNSEL'S REPRESENTATION, THAT IT'S MUCH MORE SEVERE NOW SINCE HIS ARREST AND SAY THAT IT'S NOT BEING ADEQUATELY TREATED (INAUDIBLE) PRISON,

THERE'S NO EVIDENCE BEFORE THIS COURT THAT IS NOT OR CANNOT BE ADEQUATELY TREATED BY THE BUREAU OF PRISONS. NONE WHATSOEVER. AND THAT'S NOT TO BAR DEFENSE COUNSEL FROM SUBMITTING DECLARATIONS FROM THE BUREAU OF PRISONS AS TO WHAT'S AVAILABLE (INAUDIBLE) FOR HIM BUT THE COURT KNOWS THAT THE BUREAU OF PRISONS [27] CAN PRESCRIBE THROUGH ITS DOCTORS MEDICATION SUCH AS VICODIN OR OTHER THINGS (INAUDIBLE) THE DEFENDANT TO HANDLE HIS CONDITION.

THE NEXT SPECIAL CIRCUMSTANCE (INAUDIBLE) IS THE CHARACTER AND FAMILY SUPPORT. I THINK I RESPONDED THAT (INAUDIBLE), BUT I DON'T THINK I CAN GO FURTHER THAN THAT THE THINGS THAT HE'S TALKING ABOUT ARE PERTINENT TO FLIGHT BUT THAT IS NOT A SPECIAL CIRCUMSTANCE. AND CASES THAT HE CITED ARE MUCH MORE EGREGIOUS SITUATIONS THAN WHAT WE HAVE HERE. THIS IS NOT AN UNUSUAL EXTRADITION MATTER.

FOR EXAMPLE, I THINK THE TYPICAL (INAUDIBLE) EXAMPLE IS OF DEFENDANT CITED U.S. VERSUS (INAUDIBLE), AND THAT'S SITUATION THE FUGITIVE WAS AN ORTHODOX JEW WHO COULD NOT CARRY ON HIS RELIGION IN THE BUREAU OF PRISONS. THAT WAS OBVIOUSLY A SITUATION THAT IS NOT PRESENT HERE. THE FACILITIES COULD NOT HANDLE THAT SITUATION. PLUS THERE WERE 434 COUNTS OF FRAUD INVOLVED IN THAT CASE, A VERY COMPLEX MATTER THAT WOULD REQUIRE LITIGATING INCREDIBLE AMOUNT OF SEPARATE ALLEGATIONS. THERE WERE QUESTIONS AS TO WHETHER OR NOT (INAUDIBLE) WERE EXTRADITED OR (INAUDIBLE)

QUESTIONS AS TO WHETHER SOUTH AFRICAN LAW WOULD PERMIT (INAUDIBLE) UNDER SUCH SITUATION UNLIKE THE SITUATION HERE WHERE WE (INAUDIBLE) AND THE GOVERNMENT IS ASKING FOR DETENTION. SO ALL OF [28] THESE CASES—AND I DON'T WANT TO REPEAT (INAUDIBLE)—BUT ALL OF THESE SITUATIONS ARE DRAMATICALLY DIFFERENT WITH WHAT THE DEFENDANT IS PROPOSING HERE WHICH IS THAT HE WELL-KNOWN IN THE COMMUNITY AND THAT HE'S GOT A (INAUDIBLE) CHARACTER AND THAT HE'S GOT A LOT OF MONEY AND HE'S SUCCESSFUL AND THINGS OF THAT SORT WHICH MIGHT BE PERTINENT TO FLIGHT RISK, BUT NOT PERTINENT TO SPECIAL CIRCUMSTANCE.

THE BURIAL SITE. AGAIN THAT WOULD BE AN ISSUE THAT WOULD BE PERTINENT TO FLIGHT RISK, BUT IT'S NOT A SPECIAL CIRCUMSTANCE.

THE COURT: I HAVE TO AGREE WITH THAT. THAT IS—THAT RELATES TO HIS TIES TO THE COMMUNICATE AND PROPERTY.

MR. O'BRIEN: THE LENGTH OF TIME IN CUSTODY. THE DEFENDANT HAS BEEN IN CUSTODY FOR SIX WEEKS, AND THERE ARE CASES IN WHICH TWO YEARS, THREE YEARS, YES, WOULD BE A LENGTHY PERIOD OF CUSTODY IN WHICH THE COURT HAS FOUND THAT'S A SPECIAL CIRCUMSTANCE. BUT WE'RE TALKING ABOUT SIX WEEKS NOW. AND AT THE TIME OF THE EXTRADITION HEARING, IT WILL BE APPROXIMATELY FOUR MONTHS. SO THAT'S NOT A SPECIAL CIRCUMSTANCE (INAUDIBLE)

AND THEN FINALLY WE HAVE A SUBSTANTIAL LIKELIHOOD OF PREVAILING ON THE MERITS WHICH THE [29] DEFENDANT DIDN'T (INAUDIBLE)

BUT TODAY IS SUBMITTING IT BASED UPON EVIDENCE THAT'S NOT BEFORE THE COURT.

WHAT IS BEFORE THE COURT IS THAT THERE WERE $11 MILLION TRANSFERRED TO THE DEFENDANT IN KOREA IN SUPPORT OF HIS BRIBERIES AND THAT WAS THE DEFENDANT'S PROFIT. AND BY THE WAY, WHEN WE TALK ABOUT HOW SUCCESSFUL THE DEFENDANT IS, HE'S SUCCESSFUL PRIMARILY BECAUSE OF THE MONEYS THAT HE MADE THROUGH THE CON. AND I DON'T AGREE WITH THE CHARACTERIZATION OF DEFENSE COUNSEL THAT (INAUDIBLE) MUCH SMALLER PROFIT. HIS TIME ARGUING PROBABLE CAUSE IS AT THE EXTRADITION HEARING WHICH IS SCHEDULED FOR JUNE, AND THE GOVERNMENT WOULD BE PREPARED TO ANSWER ALL OF HIS ISSUES WITH REGARD TO PROBABLE CAUSE.

BUT ONE OF HIS ARGUMENTS WITH RESPECT TO PROBABLE CAUSE WAS THAT, WELL, THE WITNESSES AREN'T CREDIBLE. WELL, THAT'S NOT SOMETHING SHOULD BE INTO THE EQUATION AS TO PROBABLE CAUSE ESPECIALLY WHEN THREE PEOPLE IN THIS CASE WERE ARRESTED, THEY WERE INDICTED, THEY WERE FOUND GUILTY EITHER THROUGH A PLEA AGREEMENT OR THROUGH TRIAL, AND THEY WERE ALL SENTENCED. AND IT'S NOT SIMPLY PROBATIONARY SENTENCES (INAUDIBLE) COOPERATING PEOPLE. THE SENTENCES THAT WERE (INAUDIBLE) IN THIS CASE WERE THAT FOR (INAUDIBLE) 18 MONTHS OF IMPRISONMENT, A SUSPENSION OF HIS EXECUTION FOR TWO [30] YEARS. FOR (INAUDIBLE), FIVE YEARS OF IMPRISONMENT. FOR HWANG, TWO AND A HALF YEARS OF IMPRISONMENT AND SUSPENSION OF HIS EXECUTION FOR FOUR YEARS. AND

THERE IS SETTLEMENT PROCEDURES (INAUDIBLE) IN KOREA WHERE PEOPLE CAN PAY FINES IN EXCHANGE FOR PRISON TIME, AND I'M NOT SURE I UNDERSTAND HOW THE PROCESS ACTUALLY WORKS. THAT'S THE SYSTEM THAT THEY HAVE THERE, AND THAT'S THE WAY (INAUDIBLE) CASES WERE SETTLED AFTERWARD. BUT IT'S NOT SIMPLY A PROBATIONARY SENTENCE, AND IT'S NOT SIMPLY A QUESTION OF CRITICIZING THE CREDIBILITY OF THE WITNESSES. HE'LL HAVE A TRIAL IN KOREA WHERE HE'LL BE ABLE TO ARGUE TO TRY TO (INAUDIBLE) THE WITNESSES. NOW IS NOT THE TIME TO DO THAT. I WOULD ASK THE COURT TO (INAUDIBLE) ON THE ISSUE OF FINDING THAT THERE ARE SPECIAL CIRCUMSTANCES BASED UPON SUBSTANTIAL LIKELIHOOD OF PREVAILING UPON THE MERITS AT THE TIME MANY EXTRADITION HEARING WHICH IS SCHEDULED IN JUNE.

I WANT TO TALK A LITTLE BIT ABOUT THE FLIGHT RISK. THE DEFENDANT IS CHARGED NOT ONLY WITH BRIBING A GOVERNMENT OFFICIAL (INAUDIBLE), BUT HE'S ALSO CHARGED WITH BRIBING THE OFFICIALS (INAUDIBLE).

THE COURT: IN KOREA.

MR. O'BRIEN: IN KOREA.

THE COURT: OKAY.

MR. O'BRIEN: (INAUDIBLE) THAT HE BRIBED THE [31] CHIEF OF POLICE TO AVOID PROSECUTION AND THEN LATER WHEN ANOTHER PROSECUTOR WAS ASSIGNED TO THE CASE, THE CASE WAS REOPENED, WELL, THAT'S WHEN HE'S PROSECUTED. THE THIRD COUNT HAS TO DO WITH STOWING AWAY HIMSELF, SMUGGLING HIMSELF OUTSIDE THE COUNTRY. HE WAS ORDERED TO STAY IN

KOREA. HE TRIED TO VIOLATE THOSE ORDERS BY LEAVING THE COUNTRY AS A CONSEQUENCE HIS PASSPORT, HIS COMMUNITY PASSPORT WAS SEIZED. AND THEN BY MEANS UNKNOWN SOMEHOW HE WAS ABLE TO SMUGGLE HIS (INAUDIBLE) OUTSIDE THE COUNTRY WITHOUT ANY KIND OF TRAVEL DOCUMENTS AND INTO THE UNITED STATES WITHOUT ANY KIND OF TRAVEL DOCUMENTS. WE DON'T KNOW HOW HE DID THAT.

SO I THINK THE POINT I'M TRYING TO MAKE TO THE COURT IS WHAT LENGTH IS THE DEFENDANT WILLING TO DO TO AVOID PROSECUTION. AND IT'S EASY TO SAY, WELL, YOU KNOW, HE HAD TO BE (INAUDIBLE) IN THE UNITED STATES OF COURSE BECAUSE THE CHARGES AREN'T PENDING AGAINST HIM IN THE UNITED STATES. BUT NOW THAT THE UNITED STATES IS (INAUDIBLE) EXTRADITING HIM, NOW HE HAS A MOTIVE TO FLEE THE UNITED STATES AND HE HAS THE WHEREWITHAL TO ACCOMPLISH THAT THROUGH HIS MILLIONS OF DOLLARS. AND THERE ARE MANY PLACES IN THE WORLD WHERE THE DEFENDANT CAN GO TO WHERE HE CAN LIVE A VERY COMFORTABLE EXISTENCE WITH THAT TYPE OF MONEY WHERE HE'S BASICALLY EVADED ONCE AGAIN THE KOREAN AUTHORITIES IN THIS CASE.

[32] SO IT'S TRUE THAT HE WAS HAPPY TO (INAUDIBLE) HERE AND HAPPY TO HAVE A BURIAL SITE HERE AND ALL OF THESE THINGS WHEN HE THOUGHT HE'D GOTTEN AWAY FROM KOREA, BUT NOW THE SITUATION HAS CHANGED. NOW THE UNITED STATES HAS ARRESTED HIM AND IS COOPERATING PER ITS TREATY OBLIGATIONS WITH KOREA TO SEND HIM TO KOREA AND SO NOW HIS MOTIVES HAVE CHANGED. AND WITH HIS

WHEREWITHAL, HE HAS THE CAPABILITY TO DO THAT PLUS WHEN HE HAS THE CAPABILITY WITHOUT TRAVEL DOCUMENTS AND EXPERIENCE WITHOUT TRAVEL DOCUMENTS TO GET INTO OTHER COUNTRIES AND THERE ARE MANY COUNTRIES IN THE WORLD WHERE THERE ARE NOT EXTRADITION TREATIES (INAUDIBLE).

THERE WAS QUESTION RAISED AS TO WHERE HE WAS WITH—WHETHER SINCE HE'S REALLY BEEN HERE SINCE 1970 OR WHETHER HE WAS RAISED—LIVING IN KOREA AND THE GOVERNMENT DOESN'T HAVE (INAUDIBLE) SO THE GOVERNMENT BELIEVES THAT THE DEFENDANT WAS NOT BEING TOTALLY HONEST WITH THE PRETRIAL SERVICES OFFICER (INAUDIBLE) WAS 1997, AND THE REASON IS THAT ACCORDING TO THE EVIDENCE THAT'S BEFORE THE COURT IN THE EXTRADITION TREATY THAT HE WAS IN KOREA IN 1999 (INAUDIBLE) THAT HE WAS IN KOREA BEING—GIVING A STATEMENT WITH REGARDS TO THIS CASE ON OCTOBER 29, 1999.

THE COURT: WAS THAT SUPPOSEDLY AFTER HE—MR. O'BRIEN: THAT WAS ACCORDING TO THE [33] DEFENDANT THAT AFTER HE WAS LAST IN KOREA BY TWO YEARS. THE COURT: WHEN DOES THE KOREAN GOVERNMENT SAY HE WAS LAST THERE.

MR. O'BRIEN: 1999, OCTOBER—

THE COURT: OKAY. AND THAT'S WHEN HE FLED—

MR. O'BRIEN: AND THEN SOMETIME IN DECEMBER 1999 TO AROUND THAT TIME PERIOD THAT HE SMUGGLED HIMSELF OUT.

THE COURT: OKAY. ALL RIGHT.

MR. O'BRIEN: AND FINALLY CONTRARY TO (INAUDIBLE) IT'S INTERESTING THAT THE DEFENSE SOMEHOW MAKES IT SEEM LESS LIKELY THAT THE DEFENDANT (INAUDIBLE) BASED UPON OTHER PEOPLE'S (INAUDIBLE). I DON'T SEE THE LOGIC IN THAT. IT SEEMS TO ME THAT IN THIS CASE THAT THERE'S A PROSECUTION THAT'S BEEN GOING ON FOR MANY YEARS AND HAS BEEN (INAUDIBLE) BY PROSECUTORS (INAUDIBLE) CASE IS QUITE STRONG AND (INAUDIBLE).

SO I WOULD SUBMIT ON THAT BASIS, YOUR HONOR. I AM SORRY (INAUDIBLE) TO TELL THE TRUTH, IT'S KIND OF DIFFICULT TO CARRY WHEN THE ARGUMENTS THAT HAVE BEEN SUBMITTED TO THE COURT LACK ANY EVIDENTIARY SUPPORT AND ALSO THEY ARE WELL BEYOND THE BRIEFING THAT'S SUBMITTED TO THE COURT IN THIS CASE. I WOULD ASK THE COURT TO (INAUDIBLE) JUDGMENT ON THIS GRANTING (INAUDIBLE) UNTIL THE EXTRADITION HEARING.

[34] THE COURT: OKAY. ANY QUICK RESPONSE?

MR. GENEGO: YES, PLEASE. I WAS CAREFUL TO MENTION THAT I WAS NOT CONFIDENT THAT I'D BEEN THROUGH ALL THE DOCUMENTS, BUT NOTHING THAT I REPRESENTED IS NOT SUPPORTED BY THE EVIDENCE. I MEAN THE FORTUNE TELLER IS ON PAGE 75 OF THE DOCUMENTS. IF YOU GO TO PAGE 76 OF THE DOCUMENTS, THEY'VE GOT THE WIRE TRANSFERS THAT WERE MADE TO THE BANK ACCOUNTS THAT ARE DOCUMENTED. THEN THEY GO ON TO SAY THAT MR. CHOE PAID THIS LEGISLATURE A HUNDRED MILLION WON ON ONE OCCASION AND ONE LOCATION ANOTHER AMOUNT TO HIS SON IN SOME OTHER LOCATION ON ANOTHER---AND SO THERE IS—THIS IS FROM THE

GOVERNMENT'S FORMAL PAPERS. ALL OF THE FACTS THAT I REPRESENTED ABOUT THE CRIME ARE FROM THE FORMAL PAPERS INCLUDING THE PERIOD OF PROHIBITION, WHICH WAS ONE MONTH. I'M HAPPY—AND I DO APOLOGIZE I DIDN'T HAVE A CHANCE TO INCLUDE IT IN MY BRIEF. I'D BE HAPPY TO SUBMIT A SUPPLEMENTAL BRIEF ON THE QUESTION OF SUBSTANTIAL LIKELIHOOD OF SUCCESS HAVING TO DO WITH THE PROBABLE CAUSE AND ADDRESS THAT IN A PRELIMINARY WAY BECAUSE I DON'T THINK HE SHOULD HAVE TO WAIT UNTIL THE ACTUAL HEARING FOR THAT.

THERE'S JUST A COUPLE OTHER THINGS THAT I DID WANT TO MENTION, AND THAT IS AS FAR AS THE RESOURCES ARE CONCERNED, HE SAID HE COULD FLEE AND LIVE COMFORTABLY [35] ELSEWHERE. WELL, THERE'S THE MATTER OF HIS FAMILY AND ALL THAT. BUT WE'RE WILLING TO TIE UP ALL OF HIS ASSETS, AND YOU CAN PUT HIM DOWN FOR ELECTRONIC MONITORING WITH GPS SO YOU KNOW WHERE HE IS AT ALL TIMES. I MEAN, IT'S MUCH BETTER THAN ELECTRONIC MONITORING. HE'LL PAY FOR IT. YOU KNOW WHERE HE IS AT ALL TIMES 24 HOURS A DAY. YOU JUST LOOK ON THE SCREEN. AND THEY NOW HAVE THAT AVAILABLE, AND I BELIEVE—

THE COURT: I'M AWARE OF THAT.

MR. GENEGO: SO WE CAN DO THAT. I MEAN, THAT'S—AND AS FAR AS THE SPECIAL CIRCUMSTANCES ABOUT THE HEALTH, HE HAS REQUESTED MEDICAL ASSISTANCE. HE HAS NOT RECEIVED MEDICAL ASSISTANCE AT THE METROPOLITAN DETENTION CENTER. I CAN CERTAINLY GET A DECLARATION FROM HIM CORROBORATING THAT OR GO THROUGH THE PROCESS OF TRYING TO

CONTACT SOMEONE AT THE METROPOLITAN DETENTION CENTER TO CONFIRM THAT, BUT THAT IS WHAT HE HAS TRIED TO DO (INAUDIBLE) AND HE HASN'T GOTTEN IT. SO I'LL BE HAPPY AGAIN TO MAKE A SUPPLEMENTAL SHOWING WITH DECLARATIONS THAT (INAUDIBLE).

THE COURT: OKAY. I'M NOT GOING TO MAKE A DECISION TODAY. I NEED TO GO BACK THROUGH THE MATERIALS IN GREATER DEPTH, AND I NEED TO READ THE CASES THEMSELVES IN GREATER DEPTH AND DO MY OWN LOOK, AND I HAVEN'T DONE THAT YET. SO THIS JUST CAME UP. SO—AND [36] OBVIOUSLY YOU WANT A DECISION. BOTH SIDES WANT A DECISION AS QUICKLY AS POSSIBLE.

IF THERE'S ANYTHING THAT YOU DO WANT TO SUBMIT YOU THINK WOULD BE HELPFUL, I'LL GIVE YOU TIME TO DO THAT. SO WHY DON'T HE TELL ME WHETHER YOU DO WANT TO SUBMIT SOMETHING BOTH IN TERMS OF—YOU KNOW, THE PROBABLE CAUSE ISSUE IS PROBLEMATIC BECAUSE THAT'S WHAT I HAVE TO DECIDE IN JUNE. I MEAN, I CAN MAKE A PRELIMINARY LOOK. IF YOU WANT TO SUPPORT YOUR ARGUMENT WITH JUST REFERENCES TO THE PLEADINGS, I'LL TAKE A LOOK AT THAT, GIVE YOU THE OPPORTUNITY TO DO THAT. BUT I'M NOT GOING TO MAKE A PROBABLE CAUSE OR LACK OF PROBABLE CAUSE FINDING IN THE CONTEXT OF THIS BAIL REVIEW.

MR. GENEGO: I UNDERSTAND, YOUR HONOR.

THE COURT: ALL RIGHT. IF THERE'S OTHER MEDICAL INFORMATION OR DECLARATIONS YOU WANT TO SUBMIT CONCERNING HIS MEDICAL PROBLEM, I'LL BE GLAD TO LOOK AT THAT TOO. BUT YOU NEED TO TELL ME WHETHER YOU WANT

TO DO THAT AND WHEN YOU WANT TO SUBMIT IT SO I CAN AT LEAST LET EVERYONE KNOW, AND I'LL DECIDE SOMETHING.

MR. GENEGO: I WOULD LIKE TO SUBMIT AND I UNDERSTAND THE COURT IS NOT GOING TO DECIDE THE PROBABLE CAUSE ISSUE UNTIL LATER. I WOULD LIKE TO AT LEAST POINT OUT THE PLACES IN THE PAPERS WHERE I THINK THOSE ISSUES ARE RAISED AND PERHAPS CITE SOME CASE LAW (INAUDIBLE) [37] PROPER ISSUE THAT HAS SOMETHING THAT THE COURT GETS TO EXAMINE AND POINT OUT WHERE THE PEOPLE GOT OFF.

THE COURT: OKAY.

MR. GENEGO: (INAUDIBLE) SENTENCES AND HOW THE WIRE TRANSFERS—THE LEGITIMATE PAYMENTS ARE DOCUMENTED AND THE OTHER ONES ARE NOT.

THE COURT: OKAY. HOW MUCH DO YOU NEED TO DO THAT?

MR. GENEGO: I THINK I CAN PROBABLY DO THAT BY TUESDAY NEXT WEEK.

THE COURT: OKAY. AND HOW MUCH TIME DO YOU WANT TO RESPOND IF YOU WANT TO RESPOND?

MR. O'BRIEN: I DO HAVE TO TELL THE COURT THAT I'M NOT GOING TO BE IN JURISDICTION NEXT WEEK. I'M GOING TO BE OUT OF LOS ANGELES (INAUDIBLE). I WAS PLANNING ON FILING MY PAPERS FOR THE EXTRADITION HEARING TOMORROW AFTERNOON SO THE COURT WILL HAVE THAT.

THE COURT: OKAY. THAT MIGHT BE ENOUGH. THAT'S ENOUGH. I MEAN—

MR. O'BRIEN: I'D ALSO LIKE AN OPPORTUNITY TO RESPOND TO WHAT DEFENSE COUNSEL (INAUDIBLE) SUBMITS ON TUESDAY THEN PERHAPS BY THE END THE FOLLOWING WEEK I CAN HAVE TO RESPOND.

THE COURT: ALL RIGHT.

MR. O'BRIEN: (INAUDIBLE.)

[38] THE COURT: YOU GET YOUR FOUR OR FIVE DAYS. I MEAN, YOU CAN SAY YOU DON'T WANT TO SUPPLY ANYTHING, BUT—

MR. GENEGO: I THINK THAT (INAUDIBLE) I JUST REALLY DON'T WANT TO WAIT THAT LONG. I THINK THAT—

THE COURT: OKAY. I MEAN, IF YOU'RE GOING TO FILE SOMETHING, I'M GOING TO GIVE HIM A CHANCE—A REASONABLE—

MR. GENEGO: (INAUDIBLE) THE RIGHT TO RESPOND TO ANYTHING THAT I WOULD FILE, IT'S JUST THAT I WOULD—I'M TROUBLED BY HAVE TO WAIT ANOTHER—

THE COURT: I UNDERSTAND THAT, AND I'M TROUBLED BY IT TOO, YOU KNOW, AND PARTICULARLY IN LIGHT OF, YOU KNOW, THE BOND CONTEXT. SO LET ME LOOK AT IT ON MY OWN. YOU KNOW, I WOULD HAVE THOUGHT IF THERE WAS ANY OTHER MEDICAL INFORMATION THAT YOU HAD—

MR. GENEGO: THE ONLY THING ABOUT THE MEDICAL INFORMATION IS THE MDC INFORMATION. I CERTAINLY CAN GET IT (INAUDIBLE) ACCORDING TO MR. CHOE AND—

THE COURT: OKAY.

MR. GENEGO: —(INAUDIBLE) PROBABLY GET ONE FROM (INAUDIBLE)—

THE COURT: AND OBVIOUSLY YOU CAN FIND OUT FROM MDC WHETHER HE'S MADE REQUESTS FOR MEDICAL. I MEAN, YOU CAN DO THAT BEFORE—

[39] MR. O'BRIEN: (INAUDIBLE.)

THE COURT: RIGHT. OKAY. AND THEN I'LL GET—DEFINITELY GET SOMETHING OUT NEXT WEEK.

MR. GENEGO: THANK YOU VERY MUCH, YOUR HONOR. THE COURT: OKAY. THANK YOU.

THE CLERK: ALL RISE. COURT IS NOW ADJOURNED.

CERTIFICATE

I, AMY HERMANSON, HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND ACCURATE TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

/s/ Amy Hermanson — 6.16.06
AMY HERMANSON — DATED

**APPENDIX C**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

[Filed APR 10, 2006]

Case No. CV 06-1544-RGK (MLG)

IN THE MATTER OF THE EXTRADITION OF
MAN-SEOK CHOE

ORDER DENYING REQUEST FOR BAIL PENDING EXTRADITION PROCEEDINGS

This extradition proceeding was initiated on January 3, 2006 by the filing of a complaint and request for warrant of arrest pursuant 18 U.S.C. § 3184.[1] It was alleged that Man-Seok Choe was subject to extradition to the Republic of South Korea pursuant to the Extradition Treaty between the United States and the Republic of South Korea which entered into force on December 20, 1999. The request for extradition indicates that a warrant has been issued for Choe's arrest by the Republic of South Korea, even though no formal charges have been filed. It further alleges that Choe violated South Korean law by engaging in acts of bribery (both acceptance and offering) related to the award of contracts on high speed trains by the government of South Korea, and then illegally fled from South Korea to the United States to avoid prosecution without valid travel documents.

Choe was arrested on February 15, 2006 and appeared before Magistrate Judge Oswald Parada on February 16, 2006, who ordered that Choe be detained without bond. On

[1] The complaint was assigned Case No. 06-M-0001.

March 13, 2006, the government filed a formal request for extradition which was assigned to District Judge R. Gary Klausner and this Magistrate Judge. On March 16, 2006, the court entered an order setting a briefing and hearing schedule. The hearing on extradition is currently set for June 22, 2006.

On April 4, 2006, Choe filed a motion for review of the order of detention entered by Judge Parada. Both parties having submitted briefs prior to the hearing and the court having heard oral argument on April 6, 2006, it is hereby ORDERED, for the reasons stated below, that Man-Seok Choe's motion for review be denied and that he be detained without bond pending further proceedings.

It is well settled that in extradition proceedings, there is a presumption against bail and that bail will be granted only upon a showing of "special circumstances." *Wright v. Henkel*, 190 U.S. 40, 63, 23 S.Ct. 781, 787, 47 L.Ed. 948 (1903); *United States v. Salerno*, 878 F.2d 317 (9th Cir. 1989), *Kamrin v. United States*, 725 F.2d 1225, 1228 (9th Cir. 1984).[2] "Examples of such circumstances include the raising of substantial claims upon which the appellant has a high probability of success, a serious deterioration of health while incarcerated, and unusual delay in the appeal process." *Salerno*, 878 F.2d at 317. Other courts have found special circumstances to exist where release would pose no danger to the community, where detention would result in an inability

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[2] Choe asserts that the imposition of a higher standard for bail in extradition proceedings than that which is required under the Bail Reform Act of 1984, 18 U.S.C. § 3142, violates his due process rights. This argument is unsupported by either statute or case law. The national interest in complying with treaties has been deemed to warrant different treatment in setting bail in the extradition context. *United States v. Leitner*, 784 F.2d 159, 160 (2nd Cir. 1986); *United States v. Taitz*, 130 F.R.D. 442 (S.D.Cal. 1990). Moreover, the Ninth Circuit has explicitly held that because an extradition proceeding is not a criminal matter, the Bail Reform Act does not govern. *Kamrin*, 725 F.2d at 1227-28.

to carry out the rituals of religion and where the offense for which extradition is sought has foreign policy implications. *Taitz*, 130 F.R.D. at 446; *In the Matter of the Requested Extradition of Kirby*, 106 F.3d 855, 856 (9th Cir. 1996).

The proffered evidence in this case reveals that Choe is 65 years old. He entered the United States in 1970 and is a 35-year legal resident of this country. He maintains his Korean citizenship. Choe has significant family ties to California and prior to his arrest, he was gainfully employed by Cal-Ransom, Inc., a family owned business. He has no criminal record. His wife and son, both of whom reside in the Central District of California, have expressed a willingness to sign an affidavit of surety in an amount in excess of $1,000,000.00, fully secured by real property. Choe would agree to submit to electronic monitoring, travel restrictions and any other condition imposed by the court.

While the government presented some evidence that Choe might pose a flight risk,[3] this court finds that Choe poses no real danger to the community and that conditions of bond could set which would insure Choe's appearance in court when required. However, the Ninth Circuit has explicitly held that a finding that a detainee is not a flight risk is insufficient in itself to constitute the "special circumstances" warranting release. *Salerno*, 878 F.2d at 318; *Accord United States v. Williams*, 611 F.2d 914, 915 (1st Cir. 1979).

Choe contends that he has established the requisite special circumstances to warrant his release on bail. In addition to his claim that he does not pose a flight risk, he claims that special circumstances have been demonstrated by the making of a *prima facie* showing that there is an absence of probable cause to believe that he engaged in the criminal conduct

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[3] This evidence includes Choe's flight from Korea while under investigation and without appropriate travel documents, which is one of the criminal offenses alleged in the extradition request.

which he is alleged to have committed in South Korea. He also contends that because no formal charges have been brought in South Korea, he may not be extradited under the terms of the applicable treaty. In addition, he alleges that significant delay will result from the anticipated challenge to the extradition request. Finally, he notes that he is of advanced age and is in poor health, suffering from back pain which is not being properly treated at the Metropolitan Detention Center.

This court reluctantly concludes that these factors, both singularly and in combination, do not give rise to the special circumstances which would warrant the setting of bond. The availability of sureties, as well as Choe's family and community ties, are only relevant to the risk of flight, which is not a factor in this determination. The anticipated delay in challenging the issue of probable cause is purely speculative given that the extradition hearing is scheduled for June 2006. His back problem does not appear to be so severe as to constitute a "special circumstance."[4] Indeed, there is no evidence other than prior conservative treatment, touching upon the back impairment. Finally, Petitioner has not persuaded the Court, at this preliminary stage of the proceedings, that there is a high probability that he would prevail on the merits.

Accordingly, even though the court believes that the risk of flight could be ameliorated by a pledge of property and the imposition of other conditions of bond such as intensive supervision and electronic monitoring, this is not enough under Ninth Circuit precedent to permit the setting of bond. Mr. Choe has failed to demonstrate the existence of any "special circumstance" which would warrant the setting of bond. Accordingly, the motion for bail review is hereby

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[4] Obviously, if Mr. Choe's medical condition deteriorates, the court would revisit the issue of bail.

DENIED and it is ordered that Mr. Choe be detained pending further proceedings.

Dated: April 10, 2006

/s/ Marc L. Goldman
MARC L. GOLDMAN
United States Magistrate Judge

**APPENDIX D**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES—GENERAL

[Filed MAY 19, 2006]

Case No. CV 06-1544-RGK (MLG) Date May 17, 2006

Title: IN THE MATTER OF EXTRADITION OF MAN-SEOK CHOE, a Fugitive from the Republic of Korea

Present: The Honorable R. GARY KLAUSNER, UNITED STATES DISTRICT JUDGE

| Sharon L. Williams | Not Reported | N/A |
|---|---|---|
| Deputy Clerk | Court Reporter / Recorder | Tape No. |

Attorneys Present for Plaintiffs:
Not Present

Attorneys Present for Defendants:
Not Present

Proceedings: (IN CHAMBERS) REVIEW OF MAGISTRATE JUDGE'S ORDER DENYING BAIL

After review and consideration of all documents submitted in connection with defendant's application for review/ reconsideration of order setting conditions of release/ detention pending trial, bail is denied.

IT IS SO ORDERED.

Initials of Preparer: slw

cc: Magistrate Judge Goldman

**APPENDIX E**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed JUN 13, 2006]

No. 06-55738

D.C. No. CV-06-01544-RGK
Central District of California, Los Angeles

UNITED STATES OF AMERICA,
*Plaintiff - Appellee,*

v.

MAN SEOK CHOE,
a Fugitive from the Republic of Korea,
*Defendant - Appellant.*

ORDER

Before: CANBY, T.G. NELSON and KLEINFELD, *Circuit Judges*.

Appellant's emergency motion for bail pending extradition proceedings is denied without prejudice to renewal should appellant experience a serious deterioration of health and if the district court denies appellant's renewed motion for bail. *See Wright v. Henkel*, 190 U.S. 40, 63 (1903); *Salerno v. United States*, 878 F.2d 317 (9th Cir. 1989).

The district court's detention order is

AFFIRMED.

**APPENDIX F**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed AUG 7, 2006]

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No. 06-55738

D.C. No. CV-06-01544-RGK
Central District of California, Los Angeles

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UNITED STATES OF AMERICA,
*Plaintiff - Appellee,*

v.

MAN SEOK CHOE,
a Fugitive from the Republic of Korea,
*Defendant - Appellant.*

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ORDER

Before: CANBY, T.G. NELSON and KLEINFELD, *Circuit Judges.*

Appellant's "motion for oder to file motion for reconsideration *nunc pro tunc*" [sic] is granted.

The motion for reconsideration is denied. *See* 9th Cir. R. 27-10.

No further filings shall be accepted in this closed case.

## APPENDIX G

### Constitutional and Statutory Provisions

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. § 3184

Whenever there is a treaty or convention for extradition between the United States and any foreign government, or in cases arising under section 3181(b), any justice or judge of the United States, or any magistrate judge authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, or provided for under section 3181(b), issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate judge, to the end that the evidence of criminality may be heard and considered. Such complaint may be filed before and such warrant may be issued by a judge or magistrate judge of the United States District Court for the District of Columbia if the whereabouts within the United States of the person charged are not known or, if there is reason to believe the person will shortly enter the United States. If, on such hearing, he deems the evidence

sufficient to sustain the charge under the provisions of the proper treaty or convention, or under section 3181(b), he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

# OPPOSITION BRIEF

Supreme Court, U.S.
FILED
APR 19 2007
OFFICE OF THE CLERK

No. 06-715

# In the Supreme Court of the United States

MAN-SEOK CHOE, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the requirement that petitioner demonstrate "special circumstances" to obtain bail while awaiting an extradition determination, *Wright* v. *Henkel*, 190 U.S. 40 (1903), violated the Due Process Clause.

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# In the Supreme Court of the United States

No. 06-715

MAN-SEOK CHOE, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The orders of the court of appeals denying petitioner's motion for bail pending extradition proceedings (Pet. App. 44a) and denying reconsideration (Pet. App. 45a) are unreported. The magistrate judge's order denying petitioner's request for bail (Pet. App. 38a-42a) and the district court's denial of review and reconsideration of that order (Pet. App. 42a) are also unreported.

### JURISDICTION

The court of appeals' order denying petitioner's motion for bail pending extradition proceedings was entered on June 13, 2006, and its order denying petitioner's motion for reconsideration or rehearing was entered on August 7, 2006. On November 3, 2006, Justice Kennedy extended the time within which to file a

petition for a writ of certiorari to and including November 20, 2006, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Petitioner was arrested based on an extradition arrest warrant issued by a magistrate judge sitting in the Central District of California, pursuant to 18 U.S.C. 3184, which stated that he was the subject of an extradition request made by the Republic of South Korea. Pet. App. 38a. The magistrate judge ordered petitioner detained without bond and denied his motion for review and reconsideration of that detention order. *Id.* at 38a-39a. The district court denied review of the magistrate judge's detention order. *Id.* at 43a. The court of appeals denied his emergency motion for bail, as well as his motion for reconsideration. *Id.* at 44a-45a.

1. Petitioner is a citizen of South Korea with lawful permanent resident status in the United States. In September 2005, the Republic of South Korea submitted a formal request to the United States Secretary of State for the extradition of petitioner. The South Korean government accused petitioner of illegal influence through bribery, bribing investigating officials, and unlawful flight from the Republic. Formal Extradition Papers and Request for Extradition 75-79 (FEP).

According to the South Korean extradition request, in 1993, petitioner and a co-conspirator bribed at least one prominent figure of the Korean government to have the Korea High Speed Rail Authority select Alsthom Company of France to supply high-speed trains for a rapid transit railway. FEP 75-76. As a result of petitioner's efforts, Alsthom was awarded the contract.

Alsthom subsequently transferred $11,292,803 to petitioner. *Id.* at 76-77. Petitioner, in turn, transferred some of those funds to his co-conspirator, as well as the family members of the government official that petitioner had bribed. *Ibid.*

After the Foreign Affairs Department of the Korean Police launched an investigation into petitioner's receipt of more than $11 million, petitioner and his co-conspirator bribed a police official who, after minimal investigation, closed the case. FEP 77-78. The Central Investigation Department at the Supreme Prosecutor's Office of the Republic of Korea then launched an investigation and obtained a departure prohibition on petitioner. As a result, petitioner was stopped at the airport while attempting to flee overseas. *Id.* at 71, 78-79. Although his Korean passport was confiscated, petitioner smuggled himself out of the Republic of Korea in 1999 without any valid travel documents. *Id.* at 79.

2. In January 2006, the government initiated extradition proceedings against petitioner, pursuant to 18 U.S.C. 3184, at the request of the Republic of South Korea. Pet. App. 38a. On February 15, 2006, petitioner was arrested, and the magistrate judge ordered petitioner detained without bond. *Id.* at 38a-42a. The magistrate judge explained that "[i]t is well settled that in extradition proceedings, there is a presumption against bail and that bail will be granted only upon a showing of 'special circumstances.'" *Id.* at 39a (quoting *Wright* v. *Henkel*, 190 U.S. 40, 63 (1903)). Such a presumption is warranted, the magistrate judge reasoned, because of "[t]he national interest in complying with treaties." *Id.* at 39a n.2. While the magistrate judge agreed with petitioner that he "poses no real danger to the community," *id.* at 40a, and that "the risk of flight could be amelio-

rated by * * * the imposition of * * * conditions of bond," *id.* at 41a, the magistrate judge held that petitioner had not demonstrated any special circumstances warranting bail. In particular, petitioner had failed to demonstrate a "high probability that he would prevail on the merits," or that he had any health condition that warranted release. *Ibid.* Finally, the magistrate judge rejected petitioner's due process challenge as "unsupported by either statute or case law." Pet. App. 39a n.2.

Petitioner filed an application for review of the magistrate judge's detention order and a petition for a writ of habeas corpus. The district court denied relief in a summary order. Pet. App. 43a. Invoking 28 U.S.C. 1291 and 2253(a), petitioner filed an emergency motion in the Ninth Circuit for bail pending appeal. The court of appeals denied the motion "without prejudice to renewal should [petitioner] experience a serious deterioration of health and if the district court denies [petitioner's] renewed motion for bail." Pet. App. 44a.

## ARGUMENT

Petitioner seeks (Pet. 8-18) this Court's review of the requirement that he demonstrate "special circumstances" to obtain bail pending his extradition proceedings. That claim does not merit further review.

1. The procedural posture of this case has materially changed in a way that moots the question decided below. The bail decision for which petitioner seeks this Court's review was made before he had been found to be extraditable. Pet. App. 39a. On October 10, 2006—almost four months after the court of appeals' order denying bail, *id.* at 44a—the magistrate judge ruled that petitioner was extraditable as charged, certified its findings to the Secretary of State, and issued a new custody rul-

ing directing that petitioner "remain in such custody until he is surrendered to the Republic of Korea, or until further order of the Secretary of State." App., *infra*, 27a.[1]

The decision finding petitioner to be extraditable moots the only question decided below, which was whether petitioner should have been released on bail pending the extradition decision. Furthermore, issuance of that decision alters the legal analysis. The plain language of 18 U.S.C. 3184 mandates that, once a fugitive has been found to be extraditable, the magistrate judge "shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made." See *Lopez-Smith* v. *Hood*, 121 F.3d 1322, 1326 (9th Cir. 1997) (noting that, after finding of extraditability, the magistrate judge has no discretion not to commit the charged individual). Accordingly, any decision concerning bail at this juncture and any review of petitioner's constitutional argument would have to factor in (i) the statutory command of detention, (ii) the heightened international relations implications of release after a finding of extraditability has been made and the case transferred to the Secretary of State, and (iii) the increased risk of flight after the individual's challenges to extradition have been rejected. No decision below considered those questions. They addressed only the now-moot question of whether release prior to a finding of extraditability would be appropriate.

2. Even setting aside the substantially altered character of the case in light of intervening developments,

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[1] A copy of the decision granting the request for extradition is attached to this brief. App., *infra*, 1a-27a.

the question presented does not warrant this Court's review. The requirement that a fugitive demonstrate special circumstances to obtain bail is consistent with and, indeed, directed by this Court's precedent. More than a century ago, this Court established a presumption against bail in extradition cases. *Wright*, 190 U.S. at 63. The Court noted that the extradition statute itself did not authorize bail, and that the unique character of extradition proceedings for international fugitives required a presumption against such release:

> The demanding government, when it has done all that the treaty and the law require it to do, is entitled to the delivery of the accused on the issue of the proper warrant, and the other government is under obligation to make the surrender; an obligation which it might be impossible to fulfil if release on bail were permitted.

*Id.* at 62. Furthermore, the effort to regain custody of a fugitive who had been sought by a foreign government through the proper treaty channels "would be surrounded with serious embarrassment" in the Nation's foreign relations. *Ibid.* The Court accordingly stated that "bail should not ordinarily be granted in cases of foreign extradition," but it declined to rule out the possibility of bail upon a showing of "special circumstances." *Id.* at 63. The Court reached that conclusion despite Wright's argument "[t]hat the denial of the right to give bail * * * constitutes a deprivation of liberty without due process of law." *Id.* at 43.

The court of appeals' decision to deny petitioner bail adheres to that precedent. Petitioner argues (Pet. 9) that *Wright*'s requirement of "special circumstances" entails nothing more than consideration of "the particu-

lar circumstances or totality of the circumstances present in any given extradition case." But that argument ignores this Court's direction that "bail should not ordinarily be granted in cases of foreign extradition," *Wright*, 190 U.S. at 63, and thus that an exceptional showing is needed to obtain bail. Petitioner made no such showing here.

Indeed, petitioner's "particular circumstances" (Pet. 9) are arguably less compelling than those advanced by Wright, which this Court held did not warrant bail in an extradition case. Wright, unlike petitioner, was a citizen of the United States. *Wright*, 190 U.S. at 40. Wright's health was suffering as a result of the detention, *id.* at 43, while petitioner's claim of a "back problem" was found to be insubstantial, Pet. App. 41a. Nothing in this Court's opinion in *Wright*, moreover, suggested that Wright was any greater flight risk than petitioner or that the government had to prove a risk of flight to justify the detention. See 190 U.S. at 62-63. Despite that record, this Court held that "no error was committed in refusing to admit [Wright] to bail." *Id.* at 63.[2]

3. As petitioner notes, there is no conflict in the circuits on the question presented. To the contrary, the courts of appeals have "uniformly" (Pet. 8) held for decades that extradition defendants must demonstrate special circumstances to obtain bail. See, *e.g.*, *In re Ex-*

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[2] Petitioner's argument (Pet. 10) that this Court was "silen[t]" concerning the need for "special circumstances" is thus incorrect. The Court's holding that Wright's circumstances were insufficient, *Wright*, 190 U.S. at 63, sets at least a threshold that, if not surpassed, cannot constitute "special circumstances." Petitioner, whose circumstances are no more compelling from Wright's (and may be less so), therefore fails to merit bail under *Wright*.

*tradition of Kirby*, 106 F.3d 855, 858 (9th Cir. 1996) ("[T]he Supreme Court recognized that there is a presumption against bail in an extradition case and only 'special circumstances' will justify bail."); *United States* v. *Kin-Hong*, 83 F.3d 523, 524 (1st Cir. 1996); *Martin* v. *Warden*, 993 F.2d 824, 827 n.4 (11th Cir. 1993) ("[W]e are aware of no decision in which a federal court has departed from the legal requirement that a defendant prove "special circumstances."); *Salerno* v. *United States*, 878 F.2d 317 (9th Cir. 1989) (no bail unless extradition defendant can show special circumstances, even when he poses only a minimal risk of flight); *In re Extradition of Russell*, 805 F.2d 1215, 1216 (5th Cir. 1986) (no bail in extradition proceedings absent special circumstances because, "[u]nlike the situation for domestic crimes, there is no presumption favoring bail. The reverse is rather the case.") (quoting *Beaulieu* v. *Hartigan*, 554 F.2d 1, 2 (1st Cir. 1977) (per curiam)); *United States* v. *Leitner*, 784 F.2d 159, 160-161 (2d Cir. 1986); *In re Extradition of Ghandtchi*, 697 F.2d 1037, 1038 (11th Cir. 1983); *Hu Yau-Leung* v. *Soscia*, 649 F.2d 914, 920 (2d Cir.), cert. denied, 454 U.S. 971 (1981); *United States* v. *Williams*, 611 F.2d 914 (1st Cir. 1979) (per curiam); *Beaulieu*, 554 F.2d at 1-2; *In re Klein*, 46 F.2d 85 (S.D.N.Y. 1930); see also *In re Mitchell*, 171 F. 289, 289 (S.D.N.Y. 1909) (Learned Hand, J.) (in extradition cases, bail should be granted "only in the most pressing circumstances, and when the requirements of justice are absolutely peremptory").

4. Finally, petitioner's argument (Pet. 12-18) that his detention violates due process is without merit. This Court's requirement of "special circumstances" and the uniformity of circuit law applying that standard reflect not only the unique foreign relations and international

law-enforcement imperatives identified by this Court in *Wright*, 190 U.S. at 62, but also the reality that almost every extradition defendant (including petitioner) is, by definition, a fugitive from justice and thus a flight risk. Beyond that inherent risk, the threat of extradition creates unique incentives for flight, due to the fear of criminal prosecution in a foreign justice system that may lack many of the protections for criminal defendants guaranteed by the United States Constitution. In addition, improvident release would entail enormous costs for the United States' own extradition requests and its international relations generally. For those reasons, the Due Process Clause's balance of interests permits the temporary detention of an individual pending extradition proceedings unless special circumstances warrant release. See *United States* v. *Salerno*, 481 U.S. 739, 750-751 (1987) (holding that an individual's "strong interest in liberty" may nevertheless "in circumstances where the government's interest is sufficiently weighty, be subordinated to the greater needs of society").[3]

A magistrate judge's prediction in an individual case that release conditions could "ameliorate[]" the risk of flight (Pet. App. 41a) does not change the constitutional balance. "[T]he risk of the applicant using release on bail as the occasion to escape does not * * * exhaust the

[3] Because the extradition decision made by a magistrate judge is not appealable, see 18 U.S.C. 3184, extradition proceedings themselves generally do not lead to long detentions. Section 3188 of Title 18, moreover, imposes a presumptive two-month time limit on the detention of a person who has been committed for rendition. Because the extradition process is often stayed (by court order or as a matter of Executive Branch discretion) pending the resolution of habeas corpus proceedings initiated by the individual, the habeas process can lengthen the detention. But the decision to prolong proceedings in that manner is the choice of the extradition defendant.

conditions that may warrant denial of bail." *Carbo* v. *United States*, 82 S. Ct. 662, 666 (1962) (Douglas, J., in chambers). Some risk of the individual absconding always remains and the costs of such flight in extradition matters are substantial and irreparable. Flight not only renders the government unable to comply with its treaty obligation in the case at issue, but also could undermine the United States' ability to assure compliance by foreign governments with their reciprocal extradition obligations and to convince other foreign governments to enter into mutual extradition treaties.[4] Indeed, concern about the damage that release could inflict on the national interest is what informed this Court's denial of bail in *Wright*, 109 U.S. at 62, notwithstanding Wright's assertion (echoed by petitioner here) that his detention violated due process, *id.* at 43. This Court repeatedly has upheld against substantive due process challenges detentions that similarly further important governmental purposes. See, *e.g.*, *Salerno*, 481 U.S. at 746-751 (pretrial detention on basis of danger to community under Bail Reform Act of 1984 serves valid regulatory purpose).[5]

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[4] See *Jiminez* v. *Aristiguieta*, 314 F.2d 649, 653 (5th Cir.) ("No amount of money could answer the damage that would be sustained by the United States were the appellant to be released on bond, flee the jurisdiction, and be unavailable for surrender, if so determined."), cert. denied, 373 U.S. 914 (1963); *Klein*, 46 F.2d at 85 (noting the "grave risk of frustrating the efforts of the executive branch of the government to fulfill treaty obligations"); *United States ex rel. McNamara* v. *Henkel*, 46 F.2d 84, 85 (S.D.N.Y. 1912) (presentation of forfeited bail to a foreign nation "is ridiculous, if not insulting").

[5] See also *Kansas* v. *Hendricks*, 521 U.S. 346, 361 (1997) (civil detention of sex offenders who pose a serious threat of recidivism); *Reno* v. *Flores*, 507 U.S. 292, 301-306 (1993) (immigration regulation authorizing release of detained juvenile aliens only to parents, close relatives,

In short, the court of appeals' denial of bail accorded with this Court's decision in *Wright*, the uniform decisions of other courts of appeals, and this Court's due process precedent. Thus, no further review would be warranted, even if the ruling below had not become moot.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2007

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or legal guardians, absent unusual and compelling circumstances, does not result in detention violating substantive due process); *Schall* v. *Martin*, 467 U.S. 253, 263-274 (1984) (post-arrest detention of juveniles on basis of danger to community serves valid regulatory purpose); *Jones* v. *United States*, 463 U.S. 354, 386-370 (1983) (indefinite detention of insanity acquitees serves valid regulatory purpose of treatment and protection of society from potential danger); *Carlson* v. *Landon*, 342 U.S. 524, 537-542 (1952) (no due process barrier to detention of potentially dangerous resident aliens pending deportation proceedings).

## APPENDIX

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

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Case No. CV 06-01544-RGK (MLG)

IN THE MATTER OF THE
EXTRADITION OF MAN SEOK CHOE, A FUGITIVE FROM
THE REPUBLIC OF KOREA

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[Filed: Oct. 10, 2006]

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**MEMORANDUM AND ORDER GRANTING REQUEST FOR EXTRADITION AND COMMITTING FUGITIVE TO CUSTODY**

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**I. Background**

Before the Court is a request for extradition brought by the Republic of Korea ("Korea"), the requesting state, against Man Seok Choe ("Choe"). Pursuant to an extradition treaty between the United States and Korea, the United States acts on behalf of Korea in this matter. *See* Extradition Treaty Between The Government of the United States of America and the Government of the Republic of Korea, Dec. 10, 1999, art. 18, 18 U.S.C. § 3181 ("Extradition Treaty" or "Treaty").

On January 3, 2006, a warrant was issued pursuant to 18 U.S.C. § 3184, for the arrest of Man Seok Choe based on a complaint filed by the United States, alleging that Choe was the subject of an extradition request

made by Korea. Case No. 06-M-0001. Pursuant to the warrant, on February 15, 2006, United States Marshals arrested Choe in this judicial district. Choe, a Korean citizen and U.S. resident alien since 1970, is accused by Korea of having committed the following crimes in Korea: (1) Acceptance of a Bribe Through Good Office, in violation of article 3 of the Act on Aggravated Punishment, etc of Specific Crimes; (2) Offering a Bribe to a Public Official, in violation of paragraph I, article 133 of the criminal code; and (3) Stowing Away, in violation of paragraph I, article 3. No formal charges have been filed by Korea.[1]

On February 16, 2006, Choe was brought before United States Magistrate Judge Oswald Parada for an initial appearance. Choe was ordered detained without bond. On March 13, 2006, Korea's formal extradition request for Choe's surrender was filed by the United States and assigned to Untied States District Judge R. Gary Klausner and this United States Magistrate Judge. On April 3, 2006, a supplement warrant of arrest was submitted by Korea and filed by the United States, extending the validity of the previous warrant to February 20, 2007.

On April 4, 2006, Choe filed a motion for review of the order detaining him without bail entered by Judge

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[1] In Korea's formal extradition papers, Kwang Soo Oh, Prosecutor of the Central Investigation Department, explains that "it is [the] normal practice of investigation and prosecution in Korea for Prosecutors not to indict a suspect who is on the run," and that an indictment will follow completion of the extradition process. (Formal Extradition Papers at 71).

The Treaty between the US and Korea allows requests for extradition to be supported by either a copy of the warrant or order of arrest, or a copy of the charging document. Treaty, art. 8(3).

Parada. This Court denied that motion on April 10, 2006, and ordered Choe detained pending further proceedings. Choe filed an application for review and reconsideration of the this Court's order by Judge Klausner, and on May 17, 2006, Judge Klausner ordered Choe detained without bail. Choe appealed the detention order to the United States Court of Appeals for the Ninth Circuit, which affirmed the District Court's order on June 16, 2006. Case No. 06-55738.

Choe filed an Opposition ("Opposition") to the request for extradition and the United States filed a Reply ("Govt.'s Reply"). An extradition hearing was held before this Court on August 3, 2006. Assistant United States Attorney Daniel O'Brien appeared on Korea's behalf, and William J. Genego appeared on behalf of Choe. After considering the parties respective papers, evidence, and oral arguments, the matter was taken under submission. For the reasons discussed below, the Court issues this Memorandum and Order granting Korea's request for Choe's extradition.

## II. Crimes Alleged[2]

### A. Acceptance of a Bribe Through Good Office, in Violation Of Article 3 of the Act on Aggravated Punishment, etc of Specific Crimes

On May 8, 1989, the Korean government announced plans to construct a national rapid transit railway system. (Formal Extradition Papers "FEP" at 71). The Korean government solicited bids for the supply of high-

[2] The facts are taken from the allegations made by Kwang Soo Oh, Prosecutor of the Central Investigation Department at the Supreme Prosecutor's Office in Korea, in support of Korea's formal request for the extradition of Choe.

speed trains, and three companies were in fierce competition for the contract. (Id.). One of those companies was Alsthom Co. of France (Alsthom"). (Id.).

In December 1992, Alsthom CEO Jean Cariou asked Ki Choon Ho (who was then an acquaintance of, but who would later marry Cariou) to assist them in locating someone who could lobby the Korean government on their behalf, and thereby help to ensure that Alsthom would be awarded the rail car contract. (FEP at 75). In February 1993, a fortuneteller with whom Ho had been acquainted introduced her to Choe, who was widely known among political and administrative officials. (Id.).

In early April of 1993, Ho and Choe met with the Chairman of Alsthom at the business room of the Westin Chosun Hotel in Seoul. The Chairman of Alsthom asked Ho and Choe if they would lobby government officials to select Alsthom for the high-speed rail contract. (FEP at 76). Alsthom promised to pay Ho and Choe 1 percent of the total contract price if Alsthom was awarded the contract. (Id.). Choe and Ho accepted Alsthom's offer, and agreed to divide the payment 65 percent / 35 percent, respectively. Later that same month, Choe approached Myung Soo Hwang, Secretary General of the ruling party in Korea and a member of the National Assembly, and asked him to exert his influence on behalf of Alsthom. (FEP at 76). Choe allegedly promised Hwang significant compensation if Alsthom was successful in its bid. (Id.).

According to the prosecutor, as a result of Choe's lobbying Alsthom was selected as supplier for Korea's high-speed rail cars on June 14, 1994. (FEP at 76). Pur-

suant to their agreement, on November 28, 1994 and May 16, 1995, Alsthom transferred approximately $11,292,803 to an account belonging to Choe in Hong Kong. (Id.). On December 10, 1994 and May 19, 1995, Choe remitted a total of $3,952.200 to Ho. (Id.). The prosecutor further alleges that Choe paid Hwang 400 million won in exchange for Hwang exerting his political influence on behalf of Alsthom. (FEP at 73, 95-96).

Under Korean law, Choe's act of accepting a monetary benefit from Alsthom in exchange for lobbying government officials on their behalf, constitutes the crime of acceptance of a bribe through good offices in violation of Article 3. (FEP at 77, 86).

**B. Offering a Bribe to a Public Official, in Violation of Paragraph I, Article 133 of the Criminal Code**

On June 8, 1995, Hong Kong police became suspicious after discovering the large amount of money deposited into Choe's Hong Kong account by Alsthom. (FEP at 72, 77). Suspecting that the money might be connected with drug trafficking, they alerted Korean officials to Choe's account activity. (Id.). By November 1995, the Korean police has launched an investigation into the transfer of funds. (FEP at 77). Shortly thereafter, Ho was questioned by the police. (FEP at 78).

It is alleged that Ho and Choe conspired to bribe Yoon Ki Jeon, Chief of the Kimpo Airport Police Station, to close the investigation. (FEP at 78). According to the prosecutor, Ho and Choe further agreed that Ho would provide the money for the bribe up front, and Choe would bear half of the expense later. (FEP at 78).

In early December 1995, Sang In Kim introduced Ho to Officer Jeon at his office. (FEP at 78). At that meet-

ing, Ho asked Officer Jeon to exert his influence to close the case with no further inquiry. (Id.). Over the next three months, Ho paid Jeon approximately $80,000. (Id.). On March 19, 1996, the investigation was closed without further investigation. (FEP at 84).

Korea claims that Choe's alleged act of conspiring with Ho to bribe a police officer to close the investigation launched against them violates paragraph I, article 133 of the criminal code, which prohibits offering a bribe to a public officer in connection with his official duties. (FEP at 78, 87).

C. **Violation of the Stowaway Control Act, Paragraph I, Article 3.**

In April 1998, the prosecutor for the Central Investigation Department at the Supreme Prosecutor's Office reopened the investigation of the 1994-95 transfers of funds from Alsthom to Choe, and the transfer of funds from Choe to Ho. (FEP at 72).

On September 28, 1999, a departure prohibition, preventing Choe from leaving Korea, was issued against Choe at the request of the investigating prosecutor. (FEP at 78). On October 2, 1999, Choe, who was unaware of the departure prohibition, was stopped by officials while trying to fly from Korea to Los Angeles, California. (FEP at 79, 85). As a result, Choe's passport was confiscated. (Id.).

Sometime in October 1999, both Choe and Ho were interrogated by an investigating prosecutor. (FEP at 74). On October 29, 1999, Choe appeared at the Central Investigation Department in order to make a statement. (FEP at 79). The departure prohibition had expired, but Choe's passport was never returned. However, some-

time in December 1999, Choe left Korea. (Id.). He eventually made his way back to the United States.

Under Korean law, Choe's act of leaving Korea, when his passport had been confiscated and without undergoing the proper departure procedures, violates paragraph 1, article 3, of the Stowaway Control Act.

## III. Discussion

### A. Legal Standard

Extradition from the United States is governed by 18 U.S.C. § 3184, which confers jurisdiction on "any justice or judge of the United States" or any authorized magistrate judge to conduct an extradition hearing under the relevant extradition treaty between the United States and the requesting nation.[3] The purpose of the extradi-

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[3] 18 U.S.C. § 3184 provides that:

> Whenever there is a treaty or convention for extradition between the United States and any foreign government, or in cases arising under section 3181(b), any justice or judge of the United States, or any magistrate judge authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any state, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, or provided for under section 3181(b), issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate judge, to the end that the evidence of criminality may be heard and considered. Such complaint may be filed before and such a warrant may be issued by a judge or magistrate judge of the United States District Court for the District of Columbia if the whereabouts within the United States of the person charged are not known or, if there is reason to believe the person will shortly enter the United States. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions

tion hearing is to determine whether a person arrested pursuant to a complaint in the United States on behalf of a foreign government is subject to surrender to the requesting country under the terms of the pertinent treaty and relevant law. *See* 18 U.S.C. § 3184. In order to surrender the person to the requesting country, the Court must determine that each of the following requirements have been met: (1) the extradition magistrate has jurisdiction to conduct the extradition proceedings; (2) the extradition magistrate has jurisdiction over the fugitive; (3) an extradition treaty is in full force and effect; (4) the crime is extraditable (the dual criminality requirement); (5) there is probable cause to believe that the individual appearing before the magistrate judge has committed the crimes alleged by the requesting nation (the probable cause requirement); and (6) there are no applicable treaty provisions which bar the extradition for any of the charged offenses. *See Barapind v. Reno*, 225 F.3d 1100, 1105 (9th Cir. 2000); *Cornejo-Barreto v. Seifert*, 218 F.3d 1004, 1009-10 (9th Cir. 2000); *Quinn v. Robinson*, 783 F.2d 776, 783, 790 (9th Cir. 1986); *Zanazanian v. U.S.* 729 F.2d 624, 626 (9th Cir. 1984).

If these requirements are met, the extradition magistrate must certify the individual as extraditable to the Secretary of State and issue a warrant to commitment. *Blaxland v. Commonwealth Dir. Of Pub. Prosecutions*,

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of the proper treaty or convention, or under section 3181(b), he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

323 F.3d 1198, 1208 (9th Cir. 2003). Once such a certification has been made, "it is the Secretary of State, representing the executive branch, who determines whether to surrender the fugitive." *Blaxland*, 323 F.3d at 1208; 18 U.S.C. § 3184. Extradition is a matter of foreign policy entirely within the discretion of the executive branch, and "the executive branch's ultimate decision on extradition may be based on a variety of grounds, ranging from individual circumstances, to foreign policy concerns, to political exigencies." *Blaxland*, 323 F.3d at 1208. Thus, the authority of the extradition magistrate is limited to the judicial determination required by section 3184.

United States citizenship does not bar extradition by the United States. *See* Treaty, art. 3(1) ("Neither [c]ontracting [s]tate shall be bound to extradite its own nationals, but the [r]equested [s]tate shall have the power to extradite such person if, in its discretion, it be deemed proper to do so"); *Charlton v. Kelly*, 229 U.S. 447, 467-8 (1913); *Quinn*, 783 F.2d at 782.

**B. The Judicial Officer is Authorized to Conduct the Extradition Proceedings**

Pursuant to section 3184 and General Order No. 01-13,[4] this Court has jurisdiction to preside over the extradition of Choe. This issue was not challenged by Choe.

**C. The Court Has Jurisdiction Over the Fugitive**

Pursuant to section 3184, this court has jurisdiction over Choe, who is "found within [this] judicial district,"

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[4] United States District Court for the Central District of California General Order No. 01-13 authorizes this Court's magistrate judges to preside over "[e]xtradition proceedings pursuant to 18 U.S.C. 3181 *et seq.*"

because he was arrested, and is presently detained, in the Central District of California. This issue was not challenged by Choe.

**D. There is an Applicable Treaty in Full Force and Effect**

The parties do not dispute, and this Court expressly finds, an extradition treaty between the United States and Korea is in full force and effect. *See* 18 U.S.C. § 3181 (Historical and Statutory Notes). The Treaty applies to offenses committed before and after the date it entered into force. Treaty, art. 20.

**E. Extraditable Offense—The Dual Criminality Requirement**

"[U]nder the doctrine of 'dual criminality,' an accused person can be extradited only if the conduct complained of is considered criminal by the jurisprudence or under the laws of both the requesting and requested nations." *Quinn*, 783 F.2d at 786-87. The dual criminality principle is explicitly incorporated into Article 2 of the Extradition Treaty, which provides that: "[a]n offense shall be an extraditable offense if, at the time of the request, it is punishable under the laws in both the Contracting States by deprivation of liberty for a period of more than one year, or by a more severe penalty." Treaty, art. 2(1).

The principle of dual criminality does not require that the name by which the crimes are described in the requesting and the requested states be the same, nor does it require that the scope of criminal liability be coextensive. *Collins v. Loisel*, 259 U.S. 309, 312 (1922). "It is enough if the particular act charged is criminal in both jurisdictions." *Id.* at 312. In determining whether

the act charged is criminal in both jurisdictions, the "totality of the conduct alleged" must be taken into account. Treaty, art. 2 (3). Moreover, an offense is extraditable whether or not the laws in the contracting states "place the offense within the same category of offense or describe the offense by the same terminology," and whether or not the constituent elements differ under the laws of the contracting states, provided "that the offenses under the laws of both states are substantially analogous." Treaty, art. 2(3)(b)(c); *see also U.S. v. Khan*, 993 F.2d 1368, 1372 (9th Cir. 1993) ("Many cases have held that dual criminality is satisfied even though the names of the crimes and the required elements were different in the two countries"); *Emami v. U.S. D.*, 834 F.2d 1444, 1450 (9th Cir. 1987) (required elements may be different in the requesting and requested nations as long as "substantive conduct each statute punishes is functionally identical"); *Cucuzzella v. Keliikoa*, 638 F.2d 105, 108 (9th Cir. 1981) ("The crimes need not be identical").

**1. Acceptance of Bribe Through Good Offices**

Choe contends that the act constituting the first offense for which extradition is requested does not satisfy the dual criminality requirement. (Opposition at 16). Specifically, Choe asserts that he cannot be extradited for the first alleged crime because his receipt of money from Alsthom is not criminal under U.S. law, and because there is no offense under U.S. law which is substantially analogous to acceptance of bribe through good offices.

The Korean law provides as follows: "Any person who receives, demands or promises any money or interest in connection with a mediation of matters belonging

to the duties of the public official, shall be punished by imprisonment for not more than five years or a fine not exceeding ten million won." (FEP at 86). In its formal papers, Korea explains that the crime is constituted when a civilian performs "good offices" with respect to affairs within the scope of a public officer's duty, and receives money or benefits in r turn for that act. (Id.). Good offices means "mediating or supporting a specific matter at a negotiation in such a way to offer convenience to a bribe-giver or to a third party." (Id.).

Choe is accused of performing "good offices", or, being the "mediator' in the selection of Alsthom as the train supplier. The selection of Alsthom was a "specific matter" or duty belonging to a public official, namely, the Minister of Construction and Transportation, whose duty it was to oversee Korea's high speed rail project. (See FEP at 86; Govt.'s Reply at 9-10). Choe allegedly performed "good offices" when he devised the scheme with Ho to bribe Hwang, a government official, to exert his influence on behalf of Alsthom, in order to "offer convenience" to Alsthom, the "bribe-giver." Thus, when Choe received money from Alsthom as reward for securing the high speed rail contract, he committed the crime of acceptance of bribe through good offices.

Choe argues, however, that the dual criminality element is not satisfied because it is not illegal in the United States to accept payment for lobbying government officials on behalf of private companies. (Opposition at 17). Choe is correct that it is the specific act of accepting money from Alsthom which forms the basis of this offense. Nevertheless, the United States contends, and this Court agrees, that this same conduct, had it occurred here, would constitute wire fraud involving the

deprivation of honest services (18 U.S.C. §§ 1343, 1346).[5] (Govt.'s Reply at 10). Sections 1343 and 1346 [6] prohibit fraudulent schemes, furthered by the transmission of funds by wire, to deprive the public of "the intangible right of honest services". 18 U.S.C. §§ 1343, 1346.

After Choe agreed to lobby on behalf of Alsthom, Choe allegedly approached Hwang, a high-ranking government official, and asked him to exert his influence on behalf of Alsthom. (FEP at 76). Korea asserts that Choe promised Hwang significant compensation in exchange for Hwang's political influence. (Id.). Choe's role as a middleman in a bribery scheme to improperly give Alsthom the advantage in winning a government contract is a scheme to "deprive another of the intangible right of honest services." Choe "cause[d] to be transmitted by means of wire" the money he accepted from Alsthom, by willingly participating in the fraudulent scheme. Thus, the allegations made by Korea establish that Choe's conduct is considered criminal in both contracting states.

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[5] The United States also asserts that Choe's conduct violates 18 U.S.C. § 202 (Bribery); 18 U.S.C. § 666 (Bribery Concerning Programs Receiving Federal Funds); and 18 U.S.C. § 1951 (Hobbs Act).

[6] 18 U.S.C. § 1343 provides, in relevant part, that: "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means, of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate commerce, any writings, signs, signals, pictures or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both."

18 U.S.C. § 1346 states that the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

Similarly, Choe's argument that the United States and Korean statutes are not "substantially analogous" also fails. *See* Treaty, art. 2(3)(b)(c); *see also Kahn*, 993 F.2d at 1372 (Pakistani law of conspiracy not sufficiently analogous to United States' separate crime of using a telephone to facilitate a drug offense). The focus of the dual criminality requirement is on the conduct charged. The statutory elements of the two crimes need not be identical. In *Theron v. U.S. Marshal*, 832 F.2d 492 (9th Cir. 1987), the court held that a South African statute, which criminalized the failure of an adjudicated insolvent to disclose his insolvency when obtaining credit, was substantially analogous to 18 U.S.C. § 1014, which criminalizes knowingly making false statements to a bank. The court explained that, while "South Africa's law is broader than section 1014 . . . both laws can be used to punish the failure to disclose a loan applicant's liabilities to a bank while obtaining credit." *Id. See also Clealry v. Gregg*, 138 F.3d 764 (9th Cir. 1998) (upholding extradition even though requesting nation's murder statute was broader than felony murder because facts alleged murder took place during robbery); *In re Russell*, 789 F.2d 801, 803 (9th Cir. 1986) (upholding extradition for conspiracy even though overt act was not required in requesting nation because request alleged several overt acts). Here too, violation of acceptance of bribe through good offices criminalizes a broader range of conduct than that which constitutes an offense under 18 U.S.C. §§ 1343, 1346. However, the two laws are sufficiently analogous because they both punish acts of the same general character—accepting money in furtherance of a scheme to improperly influence government officials engaged in fraudulent behavior with respect to the duties of their office. It is immaterial that the scope

of criminal liability is not coextensive. *See Collins*, 259 U.S. at 312. Accordingly, this Court finds that Korea has satisfied the dual criminality requirement with respect to the first alleged offense.

**2. Offering a Bribe to a Public Official**

This Court finds, and Choe does not contest, that Korea's allegations of Choe's conduct as to the second offense satisfy the dual criminality requirement.

**3. The Stowaway Control Act**

Choe also contends that criminality does not exist with respect to his illegal departure from Korea because there is no substantially analogous law in the United States which seeks to criminalize the same conduct. (Opposition at 30-33).

The Stowaway Control Act prohibits crossing of the territorial border, on a deserted ship or airplane, without valid documents or government permission. (FEP at 87). According to Korea's formal papers, the purpose of the law is "to prevent a Korean national from entering a territory outside the Republic of Korea without undergoing proper procedures." (FEP at 88). The United States argues that dual criminality is satisfied because Choe's conduct, had it occurred here, would have violated 18 U.S.C. § 1073, which prohibits unlawful flight to avoid prosecution. (Govt.'s Reply at 17).

The United States is correct that Choe fleeing Korea in order to dodge a criminal investigation pending against him would constitute unlawful flight under 18 U.S.C. § 1073. Nevertheless, this Court is not aware of any substantially analogous United States statute which has been enacted to punish conduct of the same general character as the Stowaway Control Act—simply pre-

venting U.S. nationals from crossing the border without proper documentation. Thus, this Court is not entirely convinced that the "substantive conduct each statute punishes is functionally identical" and consequently, that the dual criminality requirement is met with this offense. *See Cucuzzella*, 638 F.2d at 108. However, since this Court finds that Choe may be extradited on the first two offenses alleged, this Court need not decide whether Choe's violation of the Stowaway Act is an extraditable offense.

**F. Probable Cause**

The government requesting extradition has the burden of producing "such information as would provide reasonable grounds to believe that the person sought has committed the offense for which extradition is requested." Treaty, art. 8(3) (c); *see also Barapind*, 360 F.3d at 1068-70 (the probable cause element requires the extradition magistrate to find reasonable ground to believe the accused is guilty of the crimes charged). The burden is met if there is any evidence warranting the extradition court to make such a finding. *See Barapind*, 360 F.3d at 1068; *Quinn*, 783 F.2d at 790 (citing *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925)). Further, the requesting nation is not required to present all of its evidence at an extradition hearing. *Quinn*, 783 F.2d at 815. An extradition magistrate "does not weigh conflicting evidence and make factual determinations." *Id.* The ultimate question of guilt or innocence is left to the country requesting extradition. *See e.g., Collins*, 259 U.S. at 316; *Quinn*, 783 F.2d at 815. Moreover, it is well-settled that the rules of evidence, other than with respect to privileges, do not apply in extradition proceedings. Fed. R. Evid. 110(d) (3); *See e.g., Collins*, 259

U.S. at 317 (unsworn statements of absent witnesses may be acted upon by extradition magistrate although they could not have been received by him under the law of the state on a preliminary examination); *Mainero v. Gregg*, 164 F.3d 1199, 1206 (9th Cir. 1999) (evidence in an extradition proceeding is not incompetent simply because it is hearsay); *Emami*, 834 F.2d at 1451 ("In the Ninth Circuit it has been repeatedly held that hearsay evidence that would be inadmissable for other purposes is admissible in extradition proceedings").

**1. Acceptance of Bribe Through Good Offices**

Choe argues that because dual criminality is premised on an alleged bribe to a government official, there must be evidence presented that would justify holding Choe for trial in the United States for bribing Hwang. (Opposition at 20). Choe misstates the law.

Contrary to Choe's assertion, the Treaty only requires that a request for extradition be supported by such information as would provide probable cause to believe that the person sought "has committed the offense for which extradition is requested." Treaty, art. 8(3)(c) (emphasis added). Courts interpreting the probable cause requirement have likewise explained that the evidence must simply demonstrate that there is reasonable grounds to believe "the accused has committed the crime charged." *Quinn*, 783 F.2d at 783 (citing *Glucksman v. Henkel*, 221 U.S. 508, 512 (1911)); *Sakaguchi v. Kaululukui*, 502 F.2d 726, 729-31 (9th Cir. 1975).

There is ample information provided by Korea to support a reasonable belief that Choe accepted money from Alsthom in violation of Korean law. Ho testified that she and Choe met with Alsthom where they were

promised money in exchange for lobbying government officials for the rail contract. (FEP at 80). Ho further testified that she and Choe approached Hwang about exerting his influence on behalf of Alsthom. (Id.). A few months after Alsthom was awarded the contract, Alsthom transferred approximately $11,000,000 into Choe's account. (Id.). Alsthom CEO Ambroise Jean Cariou confirmed that Alsthom paid Choe in exchange for his lobbying efforts. (Id.). In addition, Korea has provided copies of the bank records which show Alsthom's transfer of money to Choe's Hong Kong account, and Choe's subsequent transfer of money to Ho's Hong Kong account. (FEP at 55-64, 80). Thus, this Court finds that probable cause exists to believe that Choe is guilty of the first offense charged.

2. **Offering a Bribe to a Public Official**

The only evidence of Choe's bribery of a police officer proffered by Korea are excerpts of incriminating statements, recounted by the prosecutor, made by alleged co-conspirators Ki Choon Ho and Sang In Kim, and Hee Bong Park. (FEP at 82-84). No original statements or trial transcripts were submitted. Choe contends that the evidence submitted with respect to the second offense is neither sufficiently competent nor sufficiently reliable to establish probable cause. (Opposition at 26).

In relevant part, Korea's formal papers set forth the following facts in support of its request for Choe's extradition for the bribery of a police officer.

Ho's statement recounts how she and Choe agreed in November 1995 to a pay [*sic*] police to stop the investigation of money transferred by Alsthom. (FEP at 82). Ho admits that, after consulting with Choe, Sang In Kim

introduced her to Officer Jeon, who agreed to use his influence to close the case in exchange for 80 million won (approximately $80,000), paid in installments. (Id.). Ho further stated that Choe remitted his one-half share of the bribe money to Ho on March, 27 1996. (Id.). The Prosecutor explained that the aforementioned facts were testified to by Ho at her trial, held June 16, 2000. Ho was convicted of violation of acceptance of bribe through good offices and bribe-offering to a public official. (FEP at 74). Ho was reportedly sentenced to 18 months imprisonment with suspension of its execution for two years. (Id.). Korea also submitted a copy of Ho's March 1996 bank statement showing a transfer of $45,000 to Ho by Choe. (FEP at 64).

Kim's statement, also recounted by the prosecutor in Korea's formal papers, explains how Kim was asked by Ho to introduce her to a high-ranking police officer working in the foreign affairs department. (FEP at 83). Kim admits that he introduced Officer Jeon to Ho, where he witnessed Ho ask Officer Jeon to stop the investigation into the money wired by Alsthom without any further investigation. He states that he saw Ho pay Officer Jeon 30 million won at that meeting. (Id.). Kim further states that he personally made a second payment of 30 million won to Officer Jeon, on behalf of Ho, in February 1996. (Id.). These facts are reportedly taken from Kim's testimony at Ho and Officer Jeon's bribery trials, held July 14, 2000.

A final excerpted statement by Hee Bong Park, a police officer in charge of the investigation of money wired to Choe and Ho's Hong Kong accounts, was submitted by Korea. (FEP at 83-84). In this statement, Officer Park states that during the investigation of Choe

and Ho, he and Officer Jon Tae Kim were asked by Officer Jeon to only make "light" inquiries into the matter so that Ho could not be charged. (Id.). According to the prosecutor, Officer Kim corroborated Officer Jeon's statements. (Id.).

**a. Competency of the Evidence**

Contrary to Choe's assertion, the fact that Korea has only submitted testimony as recited by the prosecutor does not render that testimony incompetent or otherwise inadmissible in this proceeding. An extradition request may be based entirely on an investigator's affidavit summarizing other witness' statements and information, as long as such evidence is properly authenticated. *Emami*, 834 F.2d at 1451 (foreign prosecutor's affidavit with summaries of statements admissible); *Zanazanian v. U.S.*, 739 F.2d 624, 627 (9th Cir. 1984) (police reports containing multiple hearsay considered sufficiently reliable to be competent). Evidence presented in Korea's formal extradition papers are facially authenticated under 18 U.S.C. § 3190, which provides, in relevant part, that:

> "The certificate of the principal diplomatic or consular officer of the United States who is resident in the demanding country constitutes proof that the documents offered are properly authenticated. Under this statute, a consular certificate is conclusive proof that the documents have been properly authenticated as admissible in a criminal proceeding in the demanding country, and the accused is not allowed to present testimony that the documents would not be admissible under the law of the foreign country."

Article 9(a) (b) of the Treaty incorporates the same principles of authentication by requiring that the documents accompanying the extradition request be admitted into evidence in an extradition proceeding when "they are certified by the principal diplomatic or consular officer of the Requested State resident in the Requesting State; or [when] they are certified or authenticated in any other manner accepted by the law of the Requested State."

The documents submitted by Korea in support of its extradition request were certified on September 15, 2005, by the Consular General in Seoul, who at the time of certification, was the principal consular officer of the United States in Korea. (FEP at 29). Thus, any attack by Choe on the competency of the evidence as such must fail.

**b. Reliability of the Evidence**

Choe further argues that, even if the prosecutor's recitation of witness statements is deemed competent evidence, those statements, and Ho's in particular, are not sufficiently reliable to establish probable cause. (Opposition at 26).

Specifically, Choe contends that it is impossible for this Court to make a fair assessment of the reliability of Ho's statement without examining the complete transcript of her testimony. (Opposition at 26). It is well-settled, however, that self-incriminating statements made by accomplices are sufficient to establish probable cause at an extradition hearing. In *Zanazanian*, the Ninth Circuit held that unsworn, unsigned police reports containing recitations of partial confessions of the fugitive's alleged accomplices were not too unreliable to es-

tablish probable cause. *Id.* Indeed, the court found that "the fact that they were given to police and incriminated the speakers themselves sufficiently indicates their reliability." *Id.* Similarly, in *Emami*, the Ninth Circuit, relying on *Zanazanian*, held that hearsay statements summarized in a German prosecutor's affidavit provided reliable evidence to support a finding of extraditability. *Emami*, 834 F.2d at 1450-52. Nothing in this case militates a different result.

Finally, Choe argues that the reliability of the statements submitted is further undermined by the apparent contradictions in the witness's testimony. (Opposition at 27-8). Although the fugitive in an extradition proceeding may offer explanatory evidence that would completely negate probable cause, evidence which merely contradicts the government's evidence, or otherwise establishes an affirmative defense to the charges, is inadmissible. *See Barapind v. Enomoto*, 400 F.3d 744, 749 (9th Cir. 2005) (en banc); *Hooker v. Klein*, 573 F.2d 1360, 1368 (9th Cir. 1978); *Mainero*, 164 F.3d at 1207 n.7. Thus, impeachment of the credibility of the requesting country's witnesses is not permitted. See *Collins*, 259 U.S. at 316.

Choe is correct that Ho's uncorroborated testimony is the sole evidence implicating Choe in the scheme to bribe Officer Jeon. Also, Ho's testimony may conflict with Kim's testimony. As Choe points out, Ho testified that she paid Officer Jeon in installments, and that she personally delivered the money on December 14 and 30, 1995. (FEP at 82). However, Kim testified that he personally made a payment to Officer Jeon in February 1996. (FEP at 83).

Here, Choe's challenges to the sufficiency of evidence based on the apparent contradictions in testimony and uncorroborated accounts of his involvement does not explain away Korea's evidence. Indeed, Choe does not even refute the evidence presented by Korea. Instead, Choe simply attacks the credibility of witnesses and, somewhat persuasively, exploits the apparent weaknesses in the government's case against him. As a result, Choe's probable cause arguments may be effective in impeaching Ho and others at trial, and they may raise disputed issues of fact helpful to his defense. However, such arguments do not help him in this proceeding, where the Court must not "weigh conflicting evidence and make factual determinations" that will be made at trial in the requesting state. *Quinn*, 783 F.2d at 815..

Thus, this Court finds that Korea has met its burden in producing competent and reliable evidence showing that there is reasonable ground to believe Choe is guilty of bribing a police officer in violation of Korean and U.S. law.

**G. Statute of Limitations**

Finally, Choe asserts that article 6 of the Treaty bars his extradition as to all three offenses. (Opposition at 2, 10-12). Article 6 provides, that:

> Extradition may be denied under this Treaty when the prosecution or the execution of punishment of the offense for which extradition is requested would have been barred because of the statute of limitations of the Requested State had the same offense been committed in the Requested State. The period during which a person for whom extradition is sought fled from justice does not count towards the

> running of the statute of limitations. Acts or circumstances which would suspend the expiration of the statute of limitations of either State shall be given effect in the Requested State, and in this regard the Requesting State shall provide a written statement of the relevant provisions of its statute of limitations, which shall be conclusive.

(FEP at 20).

It is uncontested that the statute of limitations for Choe's alleged crimes, had they been committed here, is five years. 18 U.S.C. § 3282. Korean law provides for a five year statute of limitations for the first two offenses, acceptance of a bribe and offering a bribe to a public official, and a three year statute of limitations for the third offense, violation of the stowaway act. (FEP at 88-89). The limitations period begins to run after the criminal act is completed, and in this case, commenced on May 16, 1995, December 30, 1995, and December 1999, respectively. (FEP at 89). Without interruption, under both Korean and U.S. law, the limitations period would have expired for the first two offenses on May 15, 2000 and December 29, 2000. (See FEP at 90). With respect to the third offense, under U.S. law the limitations period would have expired on December 30, 2004, and under Korean law, December 30, 2002. (Id.). In its formal papers, however, Korea explains that because Choe fled the country in December 1999 to avoid prosecution for the first two bribery offenses, the limitations period was tolled at the time of flight. (Id.). United States law would similarly stop the clock for any person found "fleeing from justice." § 18 U.S.C. 3290. In order to toll the limitations period for this reason, the government must prove that Choe fled Korea with the intent to avoid

prosecution by a preponderance of the evidence. *See Quinn*, 783 F.2d at 817.

Choe claims that the government lacks the proof necessary to establish that the limitations period was tolled when he illegally left Korea in December 1999. (Opposition at 11). A person must know that he is wanted by the authorities in order to be deemed a fugitive. *Quinn*, 783 F.2d at 816, n.38 (citing *U.S.* v. *Gonsalves*, 675 F.2d 1050, 1053 (9th Cir. 1982)). Choe accurately points out that, at the time he left Korea, there were no charges pending against him, the departure prohibition had expired, and there had not been any arrests in connection with the offenses for which he is now wanted. (Opposition at 12). Moreover, Choe asserts that, contrary to Korea's claim, there is no proof that he disobeyed a summons to appear at the prosecutor's office, issued after his last interrogation in October 1999. Indeed, no such summons has been provided in Korea's formal papers. Thus, Choe argues that he never received notice that he was wanted by the Korean authorities until his arrest on February 16, 2006. (Id.).

Choe does ignore, however, that while no formal charges had been initiated against him, he had been aware, since at least October 1999, that the authorities had re-opened the investigation against him of the 1995 transfer of money from Alsthom. (See FEP at 73). In addition, shortly before he left Korea, both he and Ho had been interrogated by prosecutors with respect to both bribery charges. (FEP at 74). While Choe is correct that it does appear as if the departure prohibition had expired when he left Korea, his surreptitious departure, without the return of his confiscated passport, or any legal documents permitting his leave, in conjunction

with all other facts, lends compelling support to the inference that he fled the country with the intention of avoiding detection by the authorities. Moreover, this Court has already found that reasonable grounds exist to believe that Choe bribed a police official to close the initial 1995 investigation. While the Court agrees that there is no evidence to support the prosecutors assertion that Choe ignored a summons to appear, such a finding does not change this Court's conclusion that the government has met its burden of showing that Choe, more likely than not, left Korea in order to avoid prosecution. Thus, this Court concludes the there [*sic*] are no applicable statutes of limitation which bar Choe's extradition.

**III. Findings, Conclusions And Certification**

For the reasons discussed above, the Court grant's Korea's request for Choe's extradition and makes the following findings and conclusions in support of this Memorandum and Order:

1. This Court has jurisdiction over the proceedings;

2. This Court has jurisdiction over Man Seok Choe;

3. There is a valid extradition treaty between the United States and the Republic of Korea in full force and effect;

4. The Korean offense of Accepting a Bribe Through Good Office and Offering a Bribe to a Public Official are extraditable offenses consisting of conduct considered to be criminal in both the United States and the Republic of Korea, and which are punishable by deprivation of liberty for a period of more than one year;

5. There is probable cause to believe that Choe committed the crimes of Accepting a Bribe Through Good Office and Offering a Bribe to a Public Official;

6. There are no applicable treaty provisions which bar extradition; and

7. The Republic of Korea's formal papers and documents in support of its request for Choe's extradition are and have been presented in accordance with the law of the United States of America and the Treaty, and have been translated and authenticated in the manner required by the Treaty.

The Court hereby certifies the above findings and conclusions, and the transcripts of the extradition hearing held in this case, to the Secretary of State, pursuant to 18 U.S.C. § 3184.

**IV. Warrant of Commitment**

The Court further orders that Choe shall be committed to custody, as required under 18 U.S.C. § 3184, and that he remain in such custody until he is surrendered to the Republic of Korea, or until further order of the Secretary of State.

DATED: October 6, 2006

/s/ MARC L. GOLDMAN
MARC L. GOLDMAN
United States Magistrate
Judge

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(2)

No. 06-715

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IN THE

# Supreme Court of the United States

MAN-SEOK CHOE,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## REPLY BRIEF IN SUPPORT OF PETITION

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## INTRODUCTION

The extradition judge found "no doubt" that petitioner's appearance in court could be ensured through the imposition of conditions if petitioner were released on bail. Pet. App. 7a, 40a. Respondent ignores this finding that petitioner posed absolutely no risk of flight, and asserts "that almost every extradition defendant (including petitioner) is, by definition, a fugitive from justice and thus a flight risk." Opp. Br. 9. Respondent resorts to this unsupported generalization because to acknowledge otherwise would be to admit that, when no flight risk is present, there is no justification for the serious deprivation of liberty caused by detention without bail.

Rather than squarely addressing that difficult issue, respondent sidesteps it, while overstating this Court's holding in *Wright v. Henkel*, 190 U.S. 40 (1903), asserting a meritless claim of mootness, incorrectly suggesting that bail cannot ever be granted to a defendant who is challenging an order certifying his extradition, and broadly citing several cases in which this Court has held detention schemes constitutional without acknowledging that the only detention that has been held consistent with due process is detention carefully tailored to serve weighty state interests. This Court should grant certiorari to correct the lower courts' misunderstanding of *Wright v. Henkel* and to address the important due process issue raised by this case.

## ARGUMENT

1. *The questions presented are not moot.*

Respondent asserts that the extradition judge's October 10, 2006 order certifying the Republic of Korea's request for petitioner's extradition moots the question whether the Due Process Clause forbids the detention without bail of an extradition defendant who poses no flight risk or danger to society. Opp. Br. 4-5. However, petitioner has not yet been extradited to Korea; he remains in federal custody; and his habeas

petition challenging the ruling certifying his extradition remains pending.

On these facts, the question whether petitioner's detention without bail violates due process is not moot. At present, petitioner is precluded from seeking release on bail while his habeas petition is pending, because the Ninth Circuit has already rejected his request for release and his argument that due process requires his release. App. 44a (citing *Wright v. Henkel*, 190 U.S. 40 (1903); *Salerno v. United States*, 878 F.2d 317 (9th Cir. 1989)). The Ninth Circuit's rulings are the law of the case, and preclude reexamination of those questions in proceedings addressing petitioner's current right to bail. *See Snow-Erlin v. United States*, 470 F.3d 804, 807 (9th Cir. 2006) (appellate decision on legal issue must be followed in subsequent proceedings in same case).[1]

Where, as here, a legal ruling has continued legal force and effect, a challenge to that ruling is not moot. For example, in *Carroll v. President & Commissioners of Princess Anne*, 393 U.S. 175 (1968), the Court reached the merits of a challenge to a long-expired, ten-day temporary injunction restraining a white supremacist organization from holding certain rallies. The Court reasoned that the state court decision that had affirmed the temporary injunction "continue[d] to play a substantial role in the response of officials to [the group's] activities." *Id.* at 178. Therefore, "[t]he underlying question persists and is agitated by the continuing activities and program of petitioners: whether, by what processes, and to what extent the authorities of the local governments may restrict petitioners in their rallies and public meetings." *Id.* at 179. In concluding that the merits of the case were properly before it, the Court relied on a previous decision concerning the mootness of a challenge to a state law authorizing seizure of

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[1] Law-of-the-case doctrine applies not only to explicit rulings but also to those that by necessary implication must have been made. *See id.*

certain businesses involved in labor disputes, when the challenged seizure had terminated. *See id.* (discussing *Division 1287 of Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees of America v. State of Missouri*, 374 U.S. 74 (1963) (hereinafter "*Division 1287*")). In that labor case, the Court had rejected the argument that the challenge was moot, reasoning that although the seizure and the strike that prompted it had terminated, "the labor dispute remains unresolved. There thus exists in the present case not merely the speculative possibility of invocation of [the seizure law] in some future labor dispute, but the presence of an existing unresolved dispute which continues subject to all the provisions of the [law]." *Division 1287*, 374 U.S. at 78.

In the instant case, but for the Ninth Circuit rulings that are the subject of the certiorari petition, petitioner could apply to the Ninth Circuit for release on bail under Federal Rule of Appellate Procedure 23(b), which authorizes the release of prisoners while a district court decision denying their habeas petition is under review. Because the challenged rulings preclude petitioner from making such application (and thus have continuing consequences for him), the questions presented are not moot. *Compare Shango v. Jurich*, 681 F.2d 1091, 1096 n.10 (7th Cir. 1982) (parties agreed appeal of preliminary injunction no longer in effect was not moot, because, among other things, holdings were law of the case).[2]

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[2] Respondent points out that the extradition statute, while silent on the issue of bail before extradition is certified, directs the extradition judge to issue a warrant for the commitment of a person whose extradition has been certified. Opp. Br. 5 (citing 18 U.S.C. § 3184). But neither the statute nor the case authority cited by respondent (*Lopez-Smith v. Hood*, 121 F.3d 1322, 1326 (9th Cir. 1997)) addresses whether bail may be granted after that warrant issues. Several courts have permitted bail, or have assumed that bail is permissible, after certification of extradition. *See, e.g., Beaulieu v. Hartigan*, 554 F.2d 1, 1-2 (1st Cir. 1977) (*per curiam*) (affirming district court's denial of habeas petition challenging certification of extradition, but leaving bail decision to district court); *see also*

Respondent also asserts that the extradition judge's certification of extradition "alters the legal analysis." Opp. Br. 5. But that does not mean the earlier decisions regarding detention before the extradition hearing are moot; it simply means that, even if this Court reverses the pre-certification order denying bail to petitioner, that ruling will not necessarily establish the invalidity of petitioner's post-certification detention.[3]

Furthermore, the Ninth Circuit's ruling that petitioner must be detained without bail pending his extradition hearing, despite the finding that he poses no flight risk, may continue to preclude petitioner's release even if his habeas petition challenging his extradition is granted. That pending habeas petition raises substantial grounds for vacating the magistrate's certification: among others, that the applicable Korean statutes of limitations periods have expired, that two of the charges do not meet the requisite dual criminality test for extraditable offenses because they do not constitute crimes in the United States, and that the third charge is not supported by probable cause. *See* Opening Brief of Appellant, *Choe v. Torres*, No. 06-56634, at 17-49 (filed in 9th Cir. Mar. 23, 2007). If the Ninth Circuit grants petitioner's habeas petition

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*United States v. Taitz*, 130 F.R.D. 442, 445-46 (S.D. Cal. 1990) (justifying release on bail based in part on projected length of habeas proceedings if extradition certified); *In re Kirby*, 106 F.3d 855, 863 (9th Cir. 1996) (same). Moreover, Federal Rule of Appellate Procedure 23(b) specifically authorizes release of a prisoner while a lower court decision denying his or her habeas petition is under appellate review. And even if the applicable statute were framed in mandatory terms, a ruling by this Court that the Due Process Clause requires the release of extradition defendants who pose no flight risk or danger would prevail over a statutory mandate.

[3] Petitioner would argue that the due process analysis requires the same result in either circumstance, and that even after certification of extradition, the absence of flight risk or danger means that the government lacks adequate justification to deprive him of his physical liberty while he challenges that certification through habeas proceedings.

and vacates the order certifying extradition, yet permits a new extradition hearing, petitioner would be back in the position of a defendant awaiting an extradition hearing. This Court has held a similar possibility that circumstances could change in a manner that would give renewed effect to a challenged ruling precludes a finding of mootness. *See City of Erie v. Paps A.M.*, 529 U.S. 277, 287 (2000) (closure of nude dancing establishment did not moot owner's challenge to city ordinance, because business was "still incorporated" and "could again decide to operate a nude dancing establishment" in city); *see also id.* at 302 (Scalia, J., concurring in judgment) (pointing out that business's sole shareholder had filed sworn affidavit disclaiming any intent to own or operate nude dancing establishment in future).

2. *Alternatively, an exception applies that would preclude dismissal of this case on mootness grounds.*

Even if respondent were right that this case is moot, that would not preclude review by this Court because the controversy would be capable of repetition yet evade review. Petitioner may very well be detained again pending extradition proceedings: if his habeas petition is successful and extradition is ultimately denied (either because the Ninth Circuit ruling does not permit retrial or because the extradition judge denies certification upon retrial), but Korea initiates another attempt to seek extradition on the same charges;[4] if the Secretary of State exercises her discretion

[4] Double jeopardy protections do not attach to extradition hearings; nor do findings in an extradition proceeding have subsequent preclusive effect if the foreign government makes another extradition request, even if the request relies on the same evidence and even if extradition was earlier denied based on insufficiency of the evidence. *See Collins v. Loisel*, 262 U.S. 426, 429-30 (1923). It is not uncommon for foreign governments to renew extradition requests after initial extradition attempts prove unsuccessful. *See, e.g., United States v. Sai-Wah*, 270 F.Supp.2d 748, 749 (W.D.N.C. 2003); *In re Atta*, 706 F. Supp. 1032, 1035-36 (E.D.N.Y. 1989).

not to extradite petitioner but Korea subsequently initiates another extradition attempt on the same or related charges; or if petitioner is acquitted of the charges he faces in Korea or is convicted and serves out his term, returns to the United States (his country of residence), and Korea again seeks to extradite him on these charges or others.

This Court has deemed cases involving similar prospects of repetition to fit within the "capable of repetition yet evading review" exception to mootness doctrine. In *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976), for example, this Court reviewed an order restricting the media from certain communications during a criminal defendant's trial, even though the defendant had been convicted and sentenced to death by the time the case reached the Court. The Court reasoned that, "[i]f [the defendant]'s conviction is reversed by the Nebraska Supreme Court and a new trial ordered, the District Court may enter another restrictive order to prevent a resurgence of prejudicial publicity before [his] retrial," and that "these orders are by nature short-lived." *Id.* at 546-47.[5] The Court has also declined to dismiss on mootness grounds other cases involving orders that were by nature temporary, when such a dismissal would likely preclude review of the merits issue. *See, e.g.*, *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 126-27 (1974) ("There are exceptions, of course. But the great majority of economic strikes do not last long enough for complete judicial review of the controversies they engender. . . . A strike['s] . . . termination . . . should not preclude challenge to state policies that have had their impact and that continue in force, unabated and unreviewed. The judiciary must not close the door to the resolution of the important questions these concrete disputes present.") (internal citations omitted); *Roe v. Wade*, 410 U.S. 113, 125 (1973) (temporary

[5] The Court also noted that the order at issue authorized prosecutors who worked for the State, a party to the case, to seek similar orders in other cases. *Id.* But the mootness holding was not dependent on this fact.

nature of pregnancy would effectively deny appellate review if end of pregnancy rendered case moot: "Our law should not be that rigid."); *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911) ("The question involved in the orders of the Interstate Commerce Commission are usually continuing . . . , and these considerations ought not to be, as they might be, defeated, by short-terms orders, capable of repetition, yet evading review, and at one time the government, and at another time the carriers, have their rights determined by the Commission without a chance of redress.").

In the instant case, the Ninth Circuit denied bail on June 13, 2006 and denied reconsideration on August 7, 2006. The extradition judge issued an order certifying the extradition request on October 10, 2006. The two months between the Ninth Circuit's final bail ruling and certification of extradition would not have provided sufficient time for petitioner to seek certiorari, much less to obtain this Court's merits review. Nor will other extradition cases offer greater opportunities for certiorari review. As the Petition pointed out, very few extradition defendants pursue their cases through the certiorari process because most submit voluntarily to extradition rather than remain in custody for months or years. *See* Pet. 17-18.[6]

3. *Respondent misstates the holding of Wright v. Henkel.*

On the merits, respondent contends that *Wright v. Henkel*, 190 U.S. 40 (1903), compels extradition defendants to demonstrate special circumstances in order to obtain bail. Opp. Br. 6-7 & n.2. In fact, respondent goes even further and characterizes *Wright* as requiring "an *exceptional* showing" in order "to obtain bail." *Id.* at 7 (emphasis added).

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[6] Extradition defendants who are ultimately convicted and sentenced in a foreign country often do not receive credit toward their foreign sentence for the time they spent incarcerated in the United States. *See, e.g., In re Smyth*, 863 F. Supp. 1137, 1148 (N.D. Cal. 1994), *reversed on other grounds*, 61 F.3d 711 (9th Cir. 1995).

*Wright* holds nothing of the sort. Nowhere in the opinion did the Court state that "special" or "exceptional" circumstances must be shown before an extradition defendant may be released. Rather, in *Wright*, the Court rejected the lower court's ruling that bail was never available in such cases, "whatever the special circumstances." *Wright*, 190 U.S. at 63. It then noted that, in any event, the record in the case did not support bail, without explaining why.[7] Contrary to respondent's suggestion, the Court did not hold that Mr. Wright was required to show special circumstances but had not done so.[8] The Court also did not address the question whether the absence of flight risk could itself constitute a circumstance ("special" or otherwise) sufficient to support a grant of bail.

The Court's observation in *Wright* that bail should not ordinarily be granted in extradition cases also did not establish (and constitutionally could not have established) that special circumstances other than the absence of danger/risk of flight are required before an extradition defendant may be released on bail. In fact, the Court's observation is consistent with the notion that the government's interest in preventing flight and the likelihood of flight are both heightened in extradition cases. But the strength of this interest and fact that it is more likely to be threatened in extradition cases does not justify detention of an extradition defendant who has been found to pose *no* risk of flight without bail.[9]

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[7] Thus, for example, the Court did not explain if it meant that the factual showing of Mr. Wright's health problems was insufficient, that health problems could never justify a grant of bail, or something in between.

[8] Even if the Court had held such circumstances to be required, petitioner would ask this Court to reconsider that holding. *See* Pet. 9-10 n.5.

[9] As respondent points out, Mr. Wright did argue that his detention without bail violated due process. *Wright*, 190 U.S. at 43. The Court in 1903 did not address that argument, which is briefly asserted without any further explanation in one of Mr. Wright's briefs to the Court. (The briefs in that case focused almost exclusively on whether courts have the inher-

4. *Respondent entirely fails to answer petitioner's due process argument.*

As previously mentioned, respondent baldly asserts "that almost every extradition defendant (including petitioner) is, by definition, a fugitive from justice and thus a flight risk." Opp. Br. 9. That assertion ignores the extradition judge's findings to the contrary in this case and the fact that many extradition defendants are present in this country not because they fled prosecution in another but because, like petitioner, they live here. *See* Pet. 3.

Respondent's failure to address these findings is no surprise, for if respondent were to admit that petitioner poses no risk of flight, it would be forced to defend detention without bail that serves no articulable purpose, much less any important purpose. Respondent cites a number of cases in which this Court has upheld detention schemes against due process challenges; petitioner cited most of the same cases and explained that those schemes involved substantial procedural safeguards and required strong showings of danger to society or risk of flight. Pet. 12-13. But respondent ignores the language in those cases making clear that the incidents and nature of the detention imposed must relate to the interest purportedly served. *See id.* at 13-15 (citing *Jones v. United States*, 463 U.S. 354, 368 (1983); *Schall v. Martin*, 467 U.S. 253, 270 (1984); *United States v. Salerno*, 481 U.S. 739, 747 (1987); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); *Zadvydas v. Davis*, 533 U.S. 678, 690, 691-92 (2001)).[10]

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ent authority to grant bail even where the statute grants no such authority, and secondarily on whether denial of bail violates the Eighth Amendment). There is no suggestion that the particular argument asserted here was considered: that *when a defendant poses no risk of flight or danger to society*, detention without bail violates due process.

[10] Respondent also cites two decisions not mentioned in the certiorari petition—*Kansas v. Hendricks*, 521 U.S. 346 (1997), and *Reno v. Flores*, 507 U.S. 292 (1993)—but neither provides support for the detention at

When detention of a defendant like petitioner does not actually further the government's articulated interest in preventing flight, but instead is based on the absence of some other non-specific "special" circumstance, it fails to meet constitutional standards.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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issue here. *Hendricks* noted that "States have in certain narrow circumstances provided for the forcible civil detainment of people who are unable to control their behavior and who thereby pose a danger to the public health and safety," and that this Court has "consistently upheld such involuntarily commitment statutes provided the confinement takes place pursuant to proper procedures and evidentiary standards." 521 U.S. at 357. While "[a] finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment," the Court upheld Mr. Hendricks' detention because he had been shown to have a mental disorder that caused a lack of volitional control and created an undue risk of future dangerousness. *Id.* at 358, 360. In *Flores*, the decision upholding a regulation permitting detained juvenile aliens to be released only to legal guardians except in unusual circumstances was based on the special status of juveniles (who "are always in some form of custody"), the absence of traditional incidents of incarceration, and the Court's determination that the government's taking custody of a child who is without available guardians best serves the interests and welfare of that child. 507 U.S. at 302, 303.